

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

HEART OF ATLANTA MOTEL, INC., A GEORGIA
CORPORATION, PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA AND ROBERT
F. KENNEDY AS THE ATTORNEY GENERAL OF
THE UNITED STATES OF AMERICA.

INDEX

| | Original | Print |
|--|----------|-------|
| Record from the United States District Court for the Northern District of Georgia, Atlanta Division | | |
| Docket entries | 1 | 1 |
| Complaint for declaratory judgment | 4 | 5 |
| Order to show cause | 11 | 10 |
| Summons and return | 12 | 11 |
| Amendment to complaint for declaratory judgment | 13 | 13 |
| Order allowing amendment to complaint | 15 | 15 |
| Plaintiff's statement of issues | 17 | 15 |
| Stipulation of facts | 20 | 17 |
| Defendants' notice of motion and motion for preliminary injunction | 22 | 18 |
| Defendants' notice of motion and motion to dismiss | 25 | 19 |
| Certificate and request for three-judge court | 27 | 20 |
| Answer and counterclaims | 28 | 21 |
| Answer to counterclaims and response to motion for preliminary injunction | 34 | 24 |
| Motion to dismiss second counterclaim and order allowing | 39 | 27 |

| | Original | Print |
|--|----------|-------|
| Record from the United States District Court for the Northern District of Georgia, Atlanta Divi- sion—Continued | | |
| Transcript of proceedings, July 17, 1964 _____ | 42 | 29 |
| Appearances _____ | 42 | 29 |
| Stipulation of counsel _____ | 48 | 32 |
| Testimony of Albert Richard Sampson— | | |
| direct _____ | 49 | 33 |
| cross _____ | 53 | 35 |
| Charles Edward Wells— | | |
| direct _____ | 56 | 37 |
| cross _____ | 59 | 39 |
| Argument on behalf of plaintiff by Mr. Rolles- ton _____ | 62 | 41 |
| Argument on behalf of defendant by Mr. Mar- shall _____ | 86 | 56 |
| Closing argument on behalf of plaintiff by Mr. Rolleston _____ | 110 | 71 |
| Reporter's certificate (omitted in printing) _____ | 114 | 73 |
| Opinion of the Court and order _____ | 115 | 74 |
| Permanent injunction _____ | 121 | 79 |
| Notice of appeal _____ | 123 | 80 |
| Amended notice of appeal _____ | 125 | 81 |
| Amendment to notice of appeal as amended _____ | 130 | 84 |
| Clerk's certificate (omitted in printing) _____ | 132 | 84 |

[fol. 1]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA**

3-Judge Case
9017

(Tuttle, Hooper & Morgan)

Jury Trial Demanded
Docket Closed

HEART OF ATLANTA MOTEL, INC., a Georgia Corporation,

vs.

THE UNITED STATES OF AMERICA and ROBERT F. KENNEDY,
as the Attorney General of the United States of America.

Basis of action:

Complaint for declaratory judgment, for temporary
and permanent injunction—Civil Rights Act of 1964
Jury trial claimed by Plaintiff on July 7, 1964

For Plaintiff:

Moreton Rolleston, Jr.
1103 C & S Nat'l Bk Bldg.
Atlanta, Ga. 30303
(JA 3-1566)

For Defendant:

Chas. L. Goodson, U.S. Atty.
Robert F. Kennedy, Atty. Gen.
Burke Marshall, Asst. Atty. Gen.
St. John Barrett, Atty.,
Dept. of Justice

J.S. 5 Card—7-2-64

J.S. 6 Card—7-22-64

7-22-64 Opinion denying complaint and issuing injunction
in favor of deft.

[fol. 2]

DOCKET ENTRIES**JURY TRIAL DEMANDED
CLOSED****DATE****FILINGS—PROCEEDINGS**

- July 2, 1964 Complaint filed.
- July 6, 1964 Summons issued and delivered to U.S. Marshal.
- July 6, 1964 Order that defendant Robert F. Kennedy show cause on 7-17-64 at 10:00 A.M., filed. Served with complaint. Notice to JSW.
- July 6, 1964 Per FAH, set for hearing on Friday, July 17, 1964 at 10:00 A.M., counsel and parties advised by notice.
- July 7, 1964 Letter to Judge Hooper advising this is a three judge case. (Per Judge Tuttle)
Order of Hon. Elbert P. Tuttle, Chief Judge of the Fifth Circuit, U.S.C.A., designating three judge court composed of Judges Tuttle, and Hooper and Morgan, U.S. District Judges—filed. Copy of order and complaint to three judges.
Pltf's. DEMAND FOR JURY TRIAL—filed. Copy to 3 judges.
- July 8, 1964 Marshal's return on service of complaint executed 7-7-64 as to both defts., filed.
- July 10, 1964 Defts.' notice of motion and motion for preliminary injunction; notice of motion and motion to dismiss, with memorandum of points and authorities in support of above two motions; certificate and request for three-judge court; ANSWER, including first and second counterclaims—filed. Marshal's return of service of

DATE

FILINGS—PROCEEDINGS

above notice, 2 motions, certificate and answer on pltf.—filed. (Copy of above to 3 judges)

Order that each party herein file with Clerk before 4:30 P.M. on 7-15-64 a brief statement containing such party's understanding of the issues of fact that will be involved in hearing for injunction set for 9:30 A.M. 7-17-64; suggesting that deft. file response to motion for injunction at same time—filed. Copy to counsel. Copy to 3 judges.

July 15, 1964 Statement of issues of fact by defts., pursuant to order of 7-10-64—filed. Copy to 3 judges.

Motion of defts. to dismiss SECOND COUNTERCLAIM in its answer—filed. To FAH by counsel (Milano) for order.

Amendment to complaint, and order allowing same, subject to objections—filed. Copy to 3 judges.

Pltf's. answer to counterclaims and response to motion for preliminary injunction—filed. Copy to 3 judges.

Pltf's. statement of issues, pursuant to order of 7-10-64—filed. Copy to 3 judges.

July 16, 1964 Order by Judges Tuttle, Hooper and Morgan allowing defts. to withdraw second counterclaim and Paragraph (c) of its prayer for relief—filed. Copy to counsel. Copy to 3 judges.

Brief of pltf. in support of complaint and prayers and in opposition to defts.' motion to dismiss complaint—filed. (copy to 3 judges by Mr. Rolleston).

July 27, 1964 Came on for hearing pursuant to Rule Nisi on preliminary injunction. Stipulation of facts, filed. Memo of law of the deft.,

DATE

FILINGS—PROCEEDINGS

filed. Court took the matter under consideration for a permanent injunction.

July 20, 1964 Supplemental statement of plaintiff, filed. (Copy to 3 judges by plft)

July 22, 1964 Deft's supplemental memorandum of law, filed. Copy to 3 judges:

July 22, 1964 Opinion of court and order enjoining plfts. from refusing to accept Negroes as guests in the motel by reason of their race and make available the goods, services, facilities, privileges and advantages to the guests of the motel; the injunction shall become effective 20 days from hereof, to-wit, August 11, 1964, filed.

[fol. 3]

July 22, 1964 Plaintiff's notice of appeal, filed. Copies to counsel and Supreme Court.

July 23, 1964 Order that plft. is enjoined from refusing to accept Negroes as guests and making any distinction upon the basis of race or color in the availability of goods, services, facilities, privileges, advantages or accommodations offered or made available to the guests; this injunction shall become effective 20 days from 7-22-64, to-wit, 8-11-64, filed. Copies to counsel.

July 24, 1964 Transcript of proceedings of July 17, 1964, filed.

July 30, 1964 Plaintiff's amended notice of appeal, filed. Copy to counsel.

July 31, 1964 Amendment to notice of appeal as amended, filed. Copy to counsel.

DATE

FILINGS—PROCEEDINGS

Aug. 12, 1964 Certified copy of opinion rendered 8-10-64
by Mr. Justice Black denying applica-
tions for stay—received.

A TRUE CERTIFIED COPY

August 12, 1964

B. G. NASH, Clerk

By: SAMMY GODSEY
Deputy Clerk

(Seal)

[fol. 4] [Handwritten notation—Filed in Clerk's Office
July 2nd, 1964. 8.55 P.M. by B. G. Nash, Clerk]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 9017

HEART OF ATLANTA MOTEL, INC., a Georgia
Corporation, Plaintiff,

vs.

THE UNITED STATES OF AMERICA and ROBERT F. KENNEDY,
as the Attorney General of the United States of Amer-
ica, Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT—Filed July 2, 1964

Jurisdiction and Venue

1. Plaintiff is a Georgia Corporation whose only place of business is in Fulton County, State of Georgia. This action is for a declaratory judgment pursuant to the provisions of the Declaratory Judgment Act set forth in 28 USCA Sections 2201 and 2202. This is also an action seeking a temporary and permanent injunction to prevent the Attorney General from exercising the powers granted unto

him under Section 2004 of the Revised Statutes (42 U.S.C. 1971), as amended in 1957 and 1960 and as further amended by the "Civil Rights Act of 1964", Section 206 (a).

Nature of Plaintiff's Business

2. Plaintiff corporation owns and operates a motel which has facilities for sleeping, eating, drinking, swimming and other activities usually carried on in a motel. The name of said motel is Heart of Atlanta Motel and it is located in the city block bounded by Courtland Street, Harris Street, [fol. 5] Piedmont Avenue and Baker Street in Fulton County, Atlanta, Georgia. Plaintiff corporation operates no other business except at this location and owns all of the land on which said motel is built. Said motel's activity is so intermingled with wholly local business and so essentially local in character as to be outside the stream of interstate commerce.

3. Heart of Atlanta Motel rents sleeping accommodations to persons desiring them. Some of the guests of Heart of Atlanta Motel live in Georgia and rent sleeping accommodations from said motel when they come to Atlanta. Some of the guests of Heart of Atlanta Motel live in other states and rent sleeping accommodations from said motel when they visit Atlanta.

4. When Heart of Atlanta Motel rents sleeping accommodations to a guest who has come from another state, that guest has literally and legally "come to rest"; his interstate movement is completed by the time he reaches the premises of the Motel; and he has ceased to be in the stream of interstate commerce when he crosses the threshold of Heart of Atlanta Motel.

5. Heart of Atlanta Motel has refused and intends to refuse to rent sleeping accommodations to persons desiring said accommodations, for several different reasons, one of which is based on the ground of race, unless ordered by this Court to comply with the provisions of the Civil Rights Act of 1964.

Controversy

6. Heart of Atlanta Motel has never rented sleeping accommodations to members of the Negro race, is not now renting sleeping accommodations to members of the Negro [fol. 6] race and does not intend to do so unless ordered by this Court to comply with the provisions of the Civil Rights Act of 1964. Plaintiff contends and shows to this Court that said Civil Rights Act of 1964 is unconstitutional and that, even if said Civil Rights Act of 1964 be held to be constitutional, plaintiff corporation is not engaged in interstate commerce and its operations do not affect interstate commerce.

7. Section 206 (a) of said Civil Rights Act of 1964 provides as follows:

"Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described."

Plaintiff corporation shows to the Court that the President of the United States has stated that the Civil Rights Act of 1964 shall be enforced by the United States and that unless the Attorney General of the United States, one [fol. 7] of the defendants herein, is restrained and enjoined from enforcing said unconstitutional act and from interfering with plaintiff's trade and business, plaintiff corporation will suffer irreparable damages.

8. Before the Civil Rights Act of 1964 became law, plaintiff corporation owned the fee simple title to Heart of Atlanta Motel and the land upon which it is located. Before the adoption of said Act, plaintiff corporation operated its motel in any way it deemed fit, provided it complied with local ordinances and statutes of the State of Georgia pertaining to the protection of the health of the guests of said motel. Before the adoption of said Act, plaintiff corporation made use of its land in any way it saw fit in its own discretion, subject only to local laws pertaining to health and pertaining to zoning. Before the adoption of said Act, plaintiff corporation picked and chose its guests from those people it considered to be compatible with the other guests of said motel and excluded Negro guests because plaintiff corporation determined that such exclusion was in the best interest of plaintiff's business and was necessary to protect plaintiff's property, trade, profits and reputation.

9. The Civil Rights Act of 1964 prohibits plaintiff corporation from exercising and enjoying the full rights inherent in the private ownership of private property in that said Act prohibits plaintiff corporation from doing now those things enumerated hereinabove in paragraph eight which it had the right to do before said Act became law. Said Civil Rights Act of 1964 deprives plaintiff corporation of liberty and property without due process of law, in violation of the Fifth Amendment to The Constitution of the United States. Defendant United States of America has taken for public use part of the rights of plaintiff corporation in and to its private property, without any compensation [fol. 8] tion, in violation of the Fifth Amendment to The Constitution of the United States, which reads in part as follows:

"... nor (shall any person) be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

10. Section 201 (a) of the Civil Rights Act of 1964 appropriates and takes for public use by all persons part of the private rights of plaintiff corporation in and to its private property, the Heart of Atlanta Motel. Said Section 201 (a) reads as follows:

"All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

11. The Civil Rights Act of 1964, Section 201 (b) provides that said Act applies to any motel "if its operations affect commerce". Section 201 (c) defines an establishment whose operations affect commerce as being, among other types of business, "any motel". Taking both of said sections together, said Act declares that the operations of any motel affect commerce and in doing so said Act unconstitutionally exceeds the grant to Congress by Article I, Section 8, Clause 3 of the Constitution of the United States of America, which is set forth hereinafter, of the power to regulate commerce among the several states, to wit:

"Powers of Congress. The Congress shall have Power.

3. *Commerce.* To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

[fol. 9] 12. The value of the liberty taken by the defendant United States of America from plaintiff corporation is priceless, but this plaintiff corporation shows that it should be compensated in an amount of not less than Ten Million (\$10,000,000.00) Dollars. The value of the rights of plaintiff corporation in and to its private property, which have been taken by the United States of America, without any compensation, is One Million (\$1,000,000.00) Dollars.

13. More than ninety-five (95%) percent of all the past guests of Heart of Atlanta Motel prefer not to rent sleeping accommodations at said motel if members of the Negro

race also rent sleeping accommodations at said motel. A majority of the guests at said motel, who account for more than fifty (50%) percent of the income to said motel, are guests who have previously rented sleeping accommodations at said motel, said guests being referred to as "repeat guests". Plaintiff corporation shows and contends that if the Attorney General of the United States, one of the defendants herein, is permitted to enforce the provisions of the Civil Rights Act of 1964 as to the plaintiff corporation and its motel, plaintiff corporation will lose a large percentage of its customers, income and good will and will suffer irreparable damages.

Wherefore, Plaintiff prays and demands:

1. That Robert F. Kennedy, as the Attorney General of the United States of America, be temporarily and permanently restrained and enjoined from enforcing said Civil Rights Act of 1964 against plaintiff corporation, Heart of Atlanta Motel, Inc.

[fol. 10] 2. Judgment in the sum of Eleven Million (\$11,000,000.00) Dollars against the United States of America, together with reasonable attorney fees for the prosecution of this action, and all costs.

Moreton Rolleston, Jr., 1103 Cit. & Sou. National Bank Building, Atlanta, Georgia 30303, Jackson 3-1566; Attorney for Plaintiff.

[fol. 11] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 9017

[Title omitted]

ORDER TO SHOW CAUSE—July 6, 1964

The petition in the above and foregoing complaint having been read and considered, it is hereby ordered that

(Robert F. Kennedy, as the Attorney General for the United States of America, be and he is hereby restrained from enforcing the provisions of the Civil Rights Act of 1964 against Heart of Atlanta Motel, Inc. until further order of this Court; and that) said Robert F. Kennedy, as the Attorney General of the United States of America, is hereby ordered to show cause before me on the 17th day of July at 10:00 A.M., 1964 why the prayers of the plaintiff corporation for permanent injunction should not be granted.

This 6th day of July, 1964.

Frank A. Hooper, Judge, United States District Court for the Northern District of Georgia.

[fol. 12]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action File No. 9017

HEART OF ATLANTA MOTEL, INC.,
a Georgia Corporation, Plaintiff,

v.

THE UNITED STATES OF AMERICA and ROBERT F. KENNEDY,
as the Attorney General of the United States of America,
Defendants.

SUMMONS AND ORDER TO SHOW CAUSE

To the above named Defendants:

You are hereby summoned and required to serve upon Moreton Rolleston, Jr. plaintiff's attorney, whose address is 1103 C & S National Bank Building, Atlanta, Georgia an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so,

judgment by default will be taken against you for the relief demanded in the complaint.

B. G. Nash, Clerk of Court, Forrest L. Martin, Deputy Clerk.

[Seal of the Court]

Date: July 6th, 1964

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 12a]

I hereby certify and return that I have this July 7th, 1964 mailed by certified mail a copy of the within Summons & Complaint and Order to the Attorney General, Washington, D. C.

W. J. Andrews, U. S. Marshal, By: Rosalie Rich.

Return on Service of Writ

I hereby certify and return, that on the 7th day of July 1964, I received this summons and served it together with the complaint and order herein as follows:

and on July 7th 1964 I served United States of America and Robert F. Kennedy as the Attorney General of the United States of America by handing to and leaving with Gus Wood Assistant U. S. Attorney a true copy of the within Summons and Complaint and order at his office in Federal Bldg., Atlanta, Ga. this 7th day of July 1964.

W. J. Andrews, United States Marshal, By Joe M. Allen, Deputy United States Marshal.

Marshal's Fee

| | |
|---------------|---------|
| Travel | \$..... |
| Service | 6.00 |
| | <hr/> |
| | \$6.00 |

Subscribed and sworn to before me, a this
..... day of, 19....

[Seal]

[Stamp—Filed in Clerk's Office, July 8, 1964, B. G. Nash,
Clerk, By: S G Deputy Clerk]

By: S G Deputy Clerk.

8436

Note.—Affidavit required only if service is made by a
person other than a United States Marshal or his Deputy.

[fol. 13] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action-No. 9017

HEART OF ATLANTA MOTEL, INC.,
a Georgia corporation, Plaintiff,

vs.

THE UNITED STATES OF AMERICA and ROBERT F. KENNEDY,
as the Attorney General of the United States of America,
Defendants.

AMENDMENT TO COMPLAINT FOR DECLARATORY JUDGMENT—
Filed July 15, 1964

Now Comes Heart of Atlanta Motel, Inc., the corporate
plaintiff in the above styled case, and with leave of Court
having first been obtained, amends its Complaint hereto-
fore filed in the following manner:

1.

By adding the following paragraph which shall be known
as Paragraph 14, as follows:

The Civil Rights Act of 1964 is unconstitutional in
that it imposes involuntary servitude upon the cor-
porate plaintiff in violation of the thirteenth amend-
ment to the Constitution of the United States which
reads as follows:

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

[fol. 14]

2.

By adding the following paragraph which shall be known as Paragraph 15, as follows:

The Civil Rights Act of 1964 is unconstitutional in that it deprives the plaintiff corporation of its freedom to contract in violation of that portion of the Fifth amendment to the Constitution of the United States which is quoted hereinabove in paragraph 9 of the original complaint.

Wherefore, Plaintiff prays:

1.

That this amendment be allowed, subject to the objections of the defendants.

2.

That the Civil Rights Act of 1964 be declared unconstitutional.

Moreton Rolleston, Jr., 1103 Cit. & Sou. Bank Building, Atlanta, Georgia 30303, Jackson 3-1566, Attorney for Plaintiff.

[fol. 15] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 9017

[Title omitted]

ORDER ALLOWING AMENDMENT TO COMPLAINT—
July 15, 1964

The foregoing amendment to the original Complaint filed in the above styled case is hereby allowed, subject to the objections of the defendants.

This 15th day of July, 1964.

Frank A. Hooper, Judge, United States District Court for the Northern District of Georgia, Atlanta Division.

[fol. 16] Certificate of Service (omitted in printing).

[fol. 17] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 9017

[Title omitted]

PLAINTIFF'S STATEMENT OF ISSUES—Filed July 15, 1964

In response to the Order of this Court, dated July 10, 1964, that the parties file a brief statement of the issues of fact that will be involved in the hearing for injunction now set for 9:30 o'clock AM, July 17, 1964, the corporate plaintiff respectfully submits the following:

1.

The answer of the defendants, by paragraph 3, admitted all well pleaded allegations of fact contained in the Complaint, except the following sentence set forth in paragraph 2 of the complaint:

"Said motel's activity is so intermingled with wholly local business and so essentially local in character as to be outside the stream of interstate commerce."

and the following portion of paragraph 9 of the Complaint:

"Defendant United States of America has taken for public use part of the rights of plaintiff corporation in and to its private property."

[fol. 18]

2.

Plaintiff corporation intends to show that there is located within the Heart of Atlanta Motel a restaurant, which is owned and operated by Interstate Hosts, Inc. whose address is 11255 West Olympic Boulevard, Los Angeles 64, California, and that it is not the policy and practice of this restaurant to refuse to sell food and provide service in the restaurant to Negroes because of their race and color and that, since the Civil Rights Act of 1964 became law, this restaurant has served all Negroes who have asked for service. Furthermore, plaintiff corporation intends to show that it leases the restaurant space to Interstate Hosts, Inc. and has no legal control over whom the restaurant shall serve and that it has agreed in principle with Interstate Hosts, Inc. that Negroes shall be served in the restaurant.

Moreton Rolleston, Jr., 1103 Citizens & Southern
Nat'l Bk. Bldg., Atlanta, Georgia 30303, Jackson
3-1566, Attorney for Plaintiff.

[fol. 19] Certificate of Service (omitted in printing).

[fol. 20]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 9017

[Title omitted]

STIPULATION OF FACTS—Filed July 17, 1964

It is stipulated by and between the Plaintiff and the Defendants that:

1.

Plaintiff owns and operates the Heart of Atlanta Motel in Atlanta, Georgia. The motel has 216 rooms for lease or hire to transient guests.

2.

Through various national advertising media, including magazines having national circulation, the Plaintiff solicits patronage for the motel from outside the State of Georgia.

3.

The Plaintiff accepts convention trade from outside the State of Georgia.

4.

Approximately 75% of the total number of guests who register at the motel are from outside the State of Georgia.

[fol. 21]

5.

Plaintiff maintains over fifty billboards and highway signs advertising the motel on highways in Georgia.

Signed: This 16th day of July, 1964, By: Moreton Rolleston, Jr., On Behalf of Plaintiff.

Signed: This 16th day of July, 1964, By: St. John Barrett, On Behalf of Defendants.

[fol. 22]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 9017

[Title omitted]

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR
PRELIMINARY INJUNCTION—Filed July 10, 1964

To Heart of Atlanta Motel, Inc., Plaintiff, and Moreten
Rolleston, Jr., Attorney for Plaintiff:

Please take notice that on July 17, 1964, at 10:00 a.m., or as soon thereafter as counsel may be heard, in the courtroom of the United States District Court for the Northern District of Georgia in the United States Post Office and Courthouse, Atlanta, Georgia, the defendants will move the Court for a preliminary injunction, pending the trial upon their first and second counterclaims, enjoining the Heart of Atlanta Motel, Inc., its successors, officers, attorneys, [fol. 23] agents and employees, together with all persons in active concert or participation with them, from:

(a) Refusing to accept Negroes as guests in the motel by reason of their race or color;

(b) Making any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities, privileges, advantages or accommodations offered or made available to the guests of the motel or to the general public within or upon any of the premises of the Heart of Atlanta Motel; and

(c) Failing or refusing to sell food and meals in the restaurant or to provide service to Negroes in the restaurant upon the same basis and in the same manner as food, meals and service are made available to white patrons; and,

(d) Otherwise violating in any manner or by any means the provision of Title II of the Civil Rights Act of 1964 with respect to the operation of the motel or of any facilities located within the premises of the motel.

This motion will be based upon all of the pleadings and other documents on file in this case and upon oral testimony and other evidence to be offered at the hearing.

[fol. 24] United States of America and Robert F. Kennedy, Attorney General of the United States, Defendants, By: Burke Marshall, Assistant Attorney General, Charles L. Goodson, United States Attorney.

[fol. 25] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 9017

HEART OF ATLANTA MOTEL, INC.,
a Georgia Corporation, Plaintiff,

v.

THE UNITED STATES OF AMERICA and ROBERT F. KENNEDY,
as the Attorney General of the United States of America,
Defendants.

DEFENDANTS' NOTICE OF MOTION AND MOTION TO
DISMISS—Filed July 10, 1964

To Heart of Atlanta Motel, Inc., Plaintiff and Moreten Rolleston, Jr., Attorney for Plaintiff:

Please take notice that on July 17, 1964, at 10:00 a.m., or as soon thereafter as counsel may be heard, in the court-

room of the United States District Court for the Northern District of Georgia, in the United States Post Office and Courthouse, Atlanta, Georgia, the defendants will move the Court for an order dismissing the complaint in this case upon the following grounds:

[fol. 26] 1. The complaint fails to state facts upon which relief can be granted.

2. The United States of America has not consented to be sued.

3. The Court lacks jurisdiction of a claim against the United States in excess of \$10,000.

United States of America and Robert F. Kennedy, Attorney General of the United States, Defendants, By: Burke Marshall, Assistant Attorney General, Charles L. Goodson, United States Attorney.

[fol. 27] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 9017

[Title omitted]

CERTIFICATE AND REQUEST FOR THREE-JUDGE COURT—
Filed July 10, 1964

Robert F. Kennedy, Attorney General of the United States, requests, pursuant to Section 206(b) of the Civil Rights Act of 1964, that a court of three judges be convened to hear and determine the above-captioned case.

The Attorney General of the United States certifies that in his opinion the above-captioned case is one of general public importance.

Robert F. Kennedy, Attorney General of the United States.

[fol. 28] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 9017

[Title omitted]

ANSWER AND COUNTERCLAIMS—Filed July 10, 1964

The United States of America and Robert F. Kennedy, defendants, answer the complaint as follows:

1. The defendants deny the allegation contained in the last sentence of paragraph 2 of the complaint that the activity of the Heart of Atlanta Motel is so intermingled with solely local business and so essentially local in character as to be outside the strain of interstate commerce.

2. The defendants deny the allegation contained in paragraph 9 of the complaint that the United States of America has taken for public use part of the rights of the plaintiff in and to its private property.

3. The defendants admit all other well pleaded allegations of fact contained in the complaint.

[fol. 29] First Defense

The complaint fails to state a claim against the defendants upon which relief can be granted.

Second Defense

The United States has not consented to be sued by the plaintiff.

Third Defense

This Court lacks jurisdiction to entertain the plaintiff's claim for damages against the United States in excess of \$10,000.

First Counterclaim

The United States of America and Robert F. Kennedy allege as a counterclaim against the plaintiff:

1. This counterclaim is asserted by the Attorney General and the United States pursuant to Section 206(a) of the Civil Rights Act of 1964 and Rule 13 of the Rules of Civil Procedure.

2. This Court has jurisdiction of this counterclaim under Section 207(a) of the Civil Rights Act of 1964 and under 28 U.S.C. 1345:

[fol. 30] 3. The Heart of Atlanta Motel, which is owned and operated by the plaintiff as alleged in paragraph 2 of the complaint, provides lodging for transients and has over two hundred rooms for rent or hire. It is a place of public accommodation within the meaning of Section 201(b) of the Civil Rights Act of 1964 and its operations affect commerce within the meaning of Section 201(c) of the Act.

4. Plaintiff has refused, is refusing and has announced that, unless enjoined by this Court, it will continue to pursue its policy of refusing accommodations in the Heart of Atlanta Motel to Negroes on account of their race or color.

5. The acts and practices set forth in the preceding paragraph constitute a pattern and practice of resistance to the full enjoyment by Negroes of the right, secured by Title II of the Civil Rights Act of 1964, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the Heart of Atlanta Motel, without discrimination or segregation on the ground of race or color, and such pattern or practice is of such a nature and is intended to deny the full exercise of such right.

[fol. 31]

Second Counterclaim

The United States of America and Robert F. Kennedy allege as a second and further counterclaim against the plaintiff:

6. The defendants re-allege each of the facts and matters set forth in paragraphs 1 through 5 of their first counterclaim.

7. Physically located within the premises of the Heart of Atlanta Motel is a restaurant, owned and operated by the plaintiff, which serves the public and holds itself out as serving patrons of the Heart of Atlanta Motel.

8. The restaurant described in paragraph 7 herein is principally engaged in selling food for consumption on its premises and it serves and offers to serve interstate travelers and a substantial portion of the food and other products which it sells has moved in commerce.

9. The restaurant described in paragraphs 7 and 8 is a place of public accommodation within the meaning of Section 201(b) of the Civil Rights Act of 1964, and its operations affect commerce within the meaning of Section 201(c) of the Act.

10. It is the policy and practice of the plaintiff to refuse to sell food and provide service in the restaurant to Negroes because of their race and color.

11. The acts and practices set forth in the preceding paragraph constitute a pattern and practice of resistance to the full enjoyment by Negroes of the right, secured by Title II of the Civil Rights Act of 1964, to the full [fol. 32] and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the Heart of Atlanta Motel, without discrimination or segregation on the ground of race or color, and such pattern or practice is of such a nature and is intended to deny the full exercise of such right.

Wherefore, the defendants pray that this Court enter an order enjoining the Heart of Atlanta Motel, Inc., its successors, officers, attorneys, agents and employees, together with all persons in active concert or participation with them, from:

- (a) Refusing to accept Negroes as guests in the motel by reason of their race or color;
- (b) Making any distinction whatever upon the basis of race or color in the availability of the goods, services,

facilities, privileges, advantages, or accommodations offered or made available to the guests of the motel or to the general public within or upon any of the premises of the Heart of Atlanta Motel;

- (c) Failing or refusing to sell food and meals in the restaurant or to provide service to Negroes in the restaurant upon the same basis and in the same manner as food, meals and service are made available to white patrons; and,

[fol. 33] (d) Otherwise violating in any manner or by any means the provision of Title II of the Civil Rights Act of 1964 with respect to the operation of the motel or of any facilities located within the premises of the motel.

Plaintiffs further pray for their costs of suit and for such further and additional relief as the interest of justice may require.

United States of America, and Robert F. Kennedy, Attorney General of the United States, Defendants, By: Robert F. Kennedy, Attorney General, Burke Marshall, Assistant Attorney General, Charles Goodson, United States Attorney, St. John Barrett, Attorney, Department of Justice.

[fol. 34] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 9017

[Title omitted]

ANSWER TO COUNTERCLAIMS AND RESPONSE TO MOTION FOR
PRELIMINARY INJUNCTION—Filed July 15, 1964

Heart of Atlanta Motel, Inc., plaintiff, answers the First Counterclaim of the defendants as follows:

1.

The allegations of paragraphs 1 and 2 of the First Counterclaim are denied and plaintiff further shows that this honorable Court has already acquired jurisdiction by virtue of the Complaint filed by the plaintiff.

2.

Plaintiff denies the allegations of paragraph 3 of the First Counterclaim which reads as follows:

"It is a place of public accommodation within the meaning of Section 201(b) of the Civil Rights Act of 1964 and its operations affect commerce within the meaning of Section 201(c) of the Act."

[fol. 35]

3.

Plaintiff denies the allegations contained in paragraph 4 of the First Counterclaim where it is alleged that "the plaintiff is refusing" accommodations to Negroes on account of their race or color.

4.

Plaintiff admits the allegations of paragraph 5 of the First Counterclaim except the reference to that portion of paragraph 4 of said First Counterclaim pertaining to "is refusing" and except that plaintiff also denies that Title II of the Civil Rights Act of 1964 secures to Negroes the right to use any of the goods, services, facilities, privileges, advantages and accommodations of Heart of Atlanta Motel. Plaintiff further denies that the restaurant located within Heart of Atlanta Motel, if construed to be a facility of Heart of Atlanta Motel, is refusing to serve Negroes on the grounds of race or color.

Answer to Second Counterclaim

5.

The plaintiff denies the allegations of paragraph 6 of the Second Counterclaim in the same manner, and verbatim, as it denied the allegations of paragraphs 1, 2, 3, 4 and 5 of the First Counterclaim.

6.

Plaintiff denies that it owns and operates a restaurant in Heart of Atlanta Motel and shows to the Court that said restaurant is owned and operated, under a lease from plaintiff corporation, by Interstate Hosts, Inc., whose address is 11255 West Olympic Boulevard, Los Angeles 64, California.

7.

Plaintiff admits the allegations of paragraph 8 of the [fol. 36] Second Counterclaim except it shows to the Court that it can neither admit nor deny, for lack of information, the following quoted portion of said paragraph 8:

"... it serves and offers to serve interstate travelers and a substantial portion of the food and other products which it sells has moved in commerce."

8.

Plaintiff denies the allegations of paragraphs 9, 10 and 11 and plaintiff further shows to the Court that said restaurant has served all Negroes, being three in number upon information and belief, who have applied for service since the Civil Rights Act of 1964 became law.

First Defense

The First and Second Counterclaims fail to state a claim against the plaintiff upon which relief can be granted in that the Civil Rights Act of 1964 is unconstitutional and violates the Fifth and Thirteenth Amendments to the Constitution of the United States as well as Article I, Section 8, Clause 3 of the Constitution of the United States of America,

In Response to the Motion for Preliminary Injunction
Plaintiff Shows to the Court as Follows:

9.

Defendants are entitled to no injunction of any kind against the operation of the restaurant in Heart of Atlanta

Motel, even if the Civil Rights Act of 1964 is constitutional, in that the restaurant is not refusing service to Negroes and has in fact served Negroes on an equal basis with other guests.

[fol. 37]

10.

Defendants are not entitled to a preliminary injunction against the plaintiff corporation because the Civil Rights Act of 1964, upon which the defendants rely, is unconstitutional.

Wherefore, plaintiff prays:

1.

That the First Counterclaim and the Second Counterclaim of the defendants be dismissed.

2.

That the Motion of the defendants for a Preliminary Injunction be denied.

Moreton Rolleston, Jr., 1103 Cit. & Sou. Bank Building, Atlanta, Georgia 30303, Jackson 3-1566, Attorney for Plaintiff.

[fol. 38] Certificate of Service (omitted in printing).

[fol. 39]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 9017

[Title omitted]

MOTION TO DISMISS SECOND COUNTERCLAIM—

Filed July 15, 1964

The United States of America and Robert F. Kennedy move to dismiss their second counterclaim in the above en-

titled case and to withdraw its prayer for relief in Paragraph (c) of its answer and counterclaim.

United States of America, and Robert F. Kennedy,
Attorney General of the United States, Defendants, By: Charles L. Goodson, United States Attorney.

[fol. 40]

[File endorsement omitted]

ORDER—Filed July 16, 1964

This Court having read and considered the attached motion of the United States of America and Robert F. Kennedy to withdraw its second counterclaim and Paragraph (c) of its prayer for relief, that motion is hereby granted and it is Ordered that the second counterclaim of the defendants be dismissed.

This the day of July, 1964.

Elbert P. Tuttle, Frank A. Hooper, Dist. Judge,
Lewis R. Morgan.

[fol. 41] Certificate of Service (omitted in printing).

[fol. 42]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 9017

HEART OF ATLANTA MOTEL, INC.,

vs.

THE UNITED STATES OF AMERICA and ROBERT F. KENNEDY,
as The Attorney General of The United States of America.

Transcript of Proceedings—Atlanta, Georgia; July 17, 1964

Before Honorable Elbert P. Tuttle, Honorable Frank A. Hooper, Honorable Lewis R. Morgan, Judges.

APPEARANCES:

For the Plaintiff: Moreton Rolleston, Jr., 255 Courtland Street, N.E., Atlanta, Georgia.

For the Defendants: Burke Marshall, St. John Barrett, Harold Green, Department of Justice, Washington 25, D. C.; Charles L. Goodson, U. S. Attorney, Atlanta, Georgia.

[fol. 44] Judge Tuttle: The Court will call two cases this morning to get responses as to whether the parties are ready to proceed. The first case is Moreton Rolleston, Junior—excuse me—Heart of Atlanta Motel, Incorporated, against The United States and Kennedy, Attorney General. Are you ready to proceed?

Mr. Rolleston: Plaintiff's ready, Your Honor.

Mr. Goodson: If it please the Court, the Attorney General and the Government will be represented in this case by Mr. Burke Marshall, the Assistant Attorney General in charge of the Civil Rights Division, and Mr. St. John Barrett of the Civil Rights Division of the Justice Department.

Judge Tuttle: Glad to have you here, Mr. Marshall.

Mr. Marshall: The Government is ready, Your Honor.

Judge Tuttle: The next case set to be heard this morning is George Willis, Jr., and others against Pickrick Corporation and Lester Maddox, and Attorney General of the United States, Intervenor. Are you ready for the plaintiffs in that case?

Mr. Alexander: The plaintiffs are ready, Your Honor. The plaintiffs will be represented by Mr. Jack Greenberg, Mrs. Connie Baker Motley and myself, William Alexander.

Mr. Marshall: The intervenors are ready.

Judge Tuttle: The defendant, Pickrick Corporation, [fol. 45] Mr. Maddox, represented in Court?

Mr. Schell: Yes, sir.

Judge Tuttle: We were just calling your case, Mr. Schell.

Mr. Schell: We're ready, sir.

Judge Tuttle: For the convenience of the parties and counsel, it would appear that there'll be some element of time, some element of delay before the second case is reached. It's impossible for me to tell now unless—I'll call on the parties in the first case and maybe they can give me an indication. Mr. McRae, we just called the case. I guess we were a minute early.

Mr. McRae: Well, we had a little trouble getting in. There was a kind of blockade and they were separating the wheat from the chaff, so to speak, and—

Judge Tuttle: You mean the lawyers and the parties from those who are not in the case?

Mr. McRae: Yes, sir; that's right. They had a blockade out there.

Judge Tuttle: Yes, sir. You are ready for the plaintiff?

Mr. McRae: We are ready, Your Honor.

Judge Tuttle: In the first case, Mr. Rolleston, will you give us an estimate of about how long you think it necessary for you to take? Are the facts—

[fol. 46] Mr. Rolleston: Your Honor, the facts have been stipulated and I think the government has two witnesses and I don't anticipate my argument to last over a half hour. I have no witnesses.

Judge Tuttle: Right. Mr. Barrett?

Mr. Barrett: I don't believe that the testimony will take more than twenty or thirty minutes, and perhaps twenty

minutes for argument. I would say forty-five minutes for —to an hour for the government's case.

Judge Tuttle: Let's see. That's 9:30 to 11:30. Counsel's estimates are usually rather optimistic. The Court will run through till 12:00 o'clock and take a recess for lunch; and then proceed in the second case. The second case may be excused until one-thirty.

Mr. Barrett: Thank you, sir.

Mr. McRae: Thank you, sir.

Mr. Greenberg: Excuse me, Your Honor. May we be permitted to sit here? Since this is the first case under the Act, I think we might—

Judge Tuttle: Oh, yes. Yes.

Mr. Greenberg: —be able to profit by it.

Judge Tuttle: Yes. Of course. You may proceed then with the first case. Mr. Rolleston, you are the moving party.

Mr. Rolleston: I did want to inquire of the Court if [fol. 47] I am the moving party since they had a motion to dismiss pending. It doesn't make any difference to me.

Judge Tuttle: We take it as the Court normally does as a motion for preliminary injunction and let the movant for the injunction proceed, and then we'll hear from the other side.

Mr. Rolleston: Thank you. If it please the Court, in this case the government has filed an answer in which they have admitted all of the actual facts pleaded in the complaint. They have denied what amounts to two conclusions, legal conclusions in the petition, so in view of that admission, we have no evidence to offer to the Court at this time.

Mr. Barrett: If the Court please, I have a written—

Judge Tuttle: Excuse me a minute, Mr. Barrett.

Mr. Barrett: Yes, sir.

Judge Tuttle: Of course, this doesn't go at all to your contention to being entitled to damages against the United States, does it?

Mr. Rolleston: No, sir; I take it that the real issue before the Court—

Judge Tuttle: Yes.

Mr. Rolleston: —is the legal question of the constitutionality.

Judge Tuttle: All right.

[fol. 48]

STIPULATION OF COUNSEL

Mr. Barrett: If the Court please, I have a written stipulation that has been entered into by counsel on both sides.

Judge Tuttle: Will you read it in the record or have it read in the record, please?

Mr. Barrett: Yes; if I may.

It is stipulated by and between the plaintiff and the defendants that,

One, Plaintiff owns and operates the Heart of Atlanta Motel in Atlanta, Georgia. The Motel has 216 rooms for lease or hire for transient guests.

Two, Through various national advertising media, including magazines having national circulation, the plaintiff solicits patronage for the Motel from outside the State of Georgia.

Three; Plaintiff accepts convention trade from outside the State of Georgia.

Four, Approximately 75% of the total number of guests who register at the hotel are from outside the State of Georgia.

Five, Plaintiff maintains over fifty billboards and highway signs advertising the Motel on highways in Georgia.

If I may, I will file the original with the clerk and pass the Court a copy. If the Court please, in view of the defendants by reason of the stipulation, the only issue [fol. 49] of fact remaining as raised by the pleadings is whether or not the plaintiff is refusing accommodations to Negroes; and the testimony which we will offer will be directed solely to that issue.

Judge Tuttle: I understood that Mr. Rolleston asserted that, alleged that in his complaint. Do you conceive that there is still an issue of fact with respect to that matter?

Mr. Barrett: Yes, Your Honor. As I understand the position of the plaintiff, he concedes that it his purpose to refuse accommodations to Negroes; but that he is not refusing and has not refused Negroes on the basis of their race since the enactment of the statute. And inasmuch as that could have a bearing on whether or not there is a pattern or practice of resistance in terms of the Act, we believe that evidence is appropriate on that point.

Judge Tuttle: Well, you may put on your evidence.

Mr. Barrett: The defendants will call Albert Richard Sampson.

ALBERT RICHARD SAMPSON, having first been duly sworn and called as a witness in behalf of the defendants, testified as follows:

Direct examination.

By Mr. Barrett:

Q. Would you state your full name, please?
[fol. 50] A. Albert Richard Sampson.

Q. Where do you live, Mr. Sampson?

A. 339 Holly Street, Apartment 2-B, Northwest, Atlanta, Georgia.

Q. What is your occupation?

A. Executive Secretary of the Atlanta Branch of the NAACP; Associate Editor of the ATLANTA ENQUIRER NEWSPAPER.

Q. Are you a Negro, Mr. Sampson?

A. Yes, I am.

Q. Mr. Sampson, on July 7th of this year, did you take any steps to make a hotel reservation?

A. Yes, I did.

Q. Would you tell the Court what you did?

A. Well, on July 7th in the afternoon, I telephoned the Heart of Atlanta Motel and made a reservation for Wednesday evening commitment. I then drove to South Carolina with some friends of mine who had to take a car to the Naval Base in Charleston, South Carolina to ship it overseas. I left Atlanta that Tuesday evening and I went to Charleston. And while in Charleston, I wired twelve dollars and thirty-six cents because the man on the phone told me that that's what the price of the room was. I wired it from a Western Union office, twelve dollars and thirty-six cents.

Q. Do you have any receipt for that wire?

A. Yes, I do.

Q. May I see it, please?

[fol. 51] A. From—

Mr. Barrett: If—pardon me—if the Court please, may this be marked for identification?

Clerk: Respondent's Exhibit Number 1 marked for identification is a receipt to Western Union Telegraph Company.

By Mr. Barrett:

Q. Mr. Sampson, I'll show you Respondent's Exhibit Number 1 for identification and ask you if that is the receipt you received from the Western Union—

A. That's correct.

Q. —Telegraph Company?

A. Yes; in Charleston, South Carolina.

Q. Did you return—

A. There was a message on the telegram, "Arriving at seven o'clock."

Q. Did you return to Atlanta?

A. Yes. I flew—

Q. How did you return?

A. I flew in on a Delta Flight 450—I mean at 4:50, Flight 620. This is my baggage stub.

Q. Where did you go when you got into the Atlanta Airport?

A. I got on a shuttle bus and the shuttle bus took us to several hotels, and my ultimate, my final destination was the Heart of Atlanta Motel.

[fol. 52] Q. Did you go in?

A. Yes.

Q. Did you go to the desk?

A. That's correct.

Q. Who was at the desk?

A. A dark haired fellow and a light haired fellow. I don't know their names. I just know that they were at the registration desk.

Q. Will you tell the Court what happened when you got to the desk, what you said and what the men at the desk said?

A. When I got to the desk, I said, "I'm here for the, for the express purpose of getting my room reservation. I wired the money ahead of time." And so they went, and they were looking for my wire. Then the dark haired fel-

low came out and he said to me, "I'm very sorry; but I don't have your wire." Meanwhile, the light haired fellow was taking someone else's reservation, and at that time I saw my name on the list, and I said, "There's my name." And the light haired fellow snatched it away. And then the dark haired fellow saw the Western Union telegram, and at that time he told me that he wouldn't be able to accommodate me because of the fact that they have a suit pending before the courts on this basic issue. And I pointed out to him that "you don't have an argument with me; you have an argument with the Federal Government. [fol. 53] The only thing I know is that I confirmed the reservation you took over the phone, and you have my receipt." And at that point, he said, "I'm very sorry. We can't accommodate you." And I said, "Will you give me my money back?" And he said, "No, I'm not qualified to give you your money back." He said, "I just can't give it to you over the counter." And I said, "I'm not leaving until I get it." I said, "I'll have to call the police because of the fact I've paid you and I think you should give me my money back." So at that time, this gentleman came in and—

Q. Who do you mean when you say "this gentleman?"

A. Mr. Rolleston. He came in and he pointed out to me—he checked both the guest list, my telegram receipt, and he took me over to the side and he pointed out to me that they had, that he had a suit against the Federal Government on this same basic situation and he said that if the courts decide for me to open up, I'll open up; but until then, I can't accommodate any Negroes. And at that time, he gave me my money back and I left the hotel.

Mr. Barrett: No further questions.

Cross examination.

By Mr. Rolleston:

Q. Mr. Sampson, were you treated in a polite, courteous manner when you were there?

[fol. 54] A. Yes.

When you got there, you talked to two men who were in red coats, did you not, who were on the front desk?

A. No—one of them had on a red coat. The other one did not. The light—the dark skinned fellow had on a red coat.

Q. And when I got there, I asked you your name and address, did I not?

A. That's correct.

Q. And what did you tell me?

A. I told you my name was Albert Richard Sampson.

Q. Where did you say you were from?

A. I was from Massachusetts.

Q. But you are from Atlanta?

A. No, I'm from Massachusetts.

Q. Well, where do you live in Atlanta?

A. I live at 339 Holly Street. See, I'm a—I was a student here in Atlanta. Because of financial difficulties, I'm not able to return to school. But my permanent address has always been in Massachusetts.

Q. You were born and raised in Massachusetts?

A. Born and raised, and I maintain my permanent address there. My voter registration is in Massachusetts.

Q. But you are now living in Atlanta?

A. I reside here in Atlanta.

[fol. 55] Q. Was it not also explained to you by myself that we had two policies, Number 1, that as a general rule we took no people of any kind or class who lived in Atlanta; and the other policy which you were explained, that we would not take members of the Negro race until this suit was disposed of?

A. You—your latter statement is correct; but your former statement isn't.

Q. You don't remember me telling you—

A. No.

Q. —that we didn't take people from Atlanta?

A. No, for the simple reason that I didn't tell you I was from Atlanta, because I came in from Charleston, and I was from Massachusetts.

Q. But you didn't tell me you were from Atlanta?

A. You didn't ask me where I was from.

Q. All right.

A. You asked me where I resided. I am from Massachusetts. If you want, I can show you my identification.

Q. I just wanted to know where you were from.

A. Thank you.

Mr. Rolleston: That's all.

Judge Tuttle: You may step down.

Mr. Barrett: Charles Wells.

[fol. 56] CHARLES EDWARD WELLS, having first been duly sworn and called as a witness in behalf of the defendants, testified as follows:

Direct examination.

By Mr. Barrett:

Q. Would you state your full name, please?

A. Charles Edward Wells, Senior.

Q. Where do you live, Reverend Wells?

A. I live at 1096 Main Street, Macon, Georgia.

Q. Where are you living at the present time? Where are you residing?

A. Presently I am residing at 641 Beckwith Street.

Q. In Atlanta?

A. That's correct.

Q. But Macon is your permanent address, permanent residence?

A. That's correct.

Q. Are you employed?

A. Yes, I am employed.

Q. By whom?

A. I'm employed by the United States Post Office.

Q. In what capacity?

A. I'm employed as a clerk.

Q. Are you also a minister?

A. That's correct.

Q. What education have you had, Reverend Wells?

A. I'm a graduate of West Virginia State College, re-[fol. 57] ceiving a Bachelor of Arts Degree in Psychology and Sociology; presently pursuing a Bachelor of Divinity Degree.

Q. Reverend Wells, I'd like to call your attention to July 11th of this year and ask you if you went to the Heart of Atlanta Motel here in Atlanta on that day?

A. Yes, I did.

Q. Was anyone with you?

A. Yes, a minister friend of mine was with me.

Q. What is his name?

A. The Reverend John H. Gillison.

Q. About what time did you go to the motel?

A. Approximately one o'clock.

Q. What was your purpose in going there?

A. The purpose for going to the motel was to seek accommodations in the motel; a room.

Q. Did you go to the desk?

A. Yes, I did.

Q. Two of you together at that time?

A. That's correct.

Q. Would you just tell the Court what happened when you went to the desk, what you said and what others said while you were there?

A. Well, I went to the desk. I believe I approached the clerk first. And I asked him if he had any vacancies. He told me he would not be able to rent me a room. And I asked him why, and I believe he told me that it was the [fol. 58] policy of the motel not to rent rooms to Negroes until such time as a decision was made on the suit which was pending in the Federal Courts. I then asked to see the manager, and asked him the same question. He gave me the same answer. At that time, the, I assumed it was the owner, appeared and I asked him about the matter and he told me that the motel had adopted a policy not to serve Negro guests until such time—not to rent rooms to Negro guests until such time as a decision was made on the suit that was pending in the Federal Courts. I then asked him if he was telling me that he was failing to comply with the civil rights law that had been passed, and he told me that he wasn't—he told me that the only thing that he was saying is what he had said before, and he repeated that he wasn't renting guests—renting rooms to Negro guests until such time as a decision had been made on the suit that was pending in, in Federal Court.

Q. Have you since learned the name of the person that you spoke to on that occasion?

A. I believe his name is Mr. Morty Rolleston, or something of that nature.

Q. The plaintiff in this case who is seated here at the table?

A. That's correct.

Mr. Rolleston: If it please the Court, I would like to correct counsel. The plaintiff is a corporation.

Mr. Barrett: Yes. I beg your pardon. Yes.

[fol. 59] Judge Tuttle: You don't object to his assumption that you are president of the corporation, do you?

Mr. Rolleston: No, sir.

Judge Tuttle: I believe you allege that, don't you?

Mr. Rolleston: No, sir; I didn't allege that.

Judge Tuttle: You didn't allege that.

Mr. Barrett: No further questions.

Cross examination.

By Mr. Rolleston:

Q. Reverend Wells, when you came to the motel, who else was with you?

A. I believe I answered that question before. The Reverend John H. Gillison.

Q. And when I was talking to you two gentlemen, were you treated courteously and politely?

A. Yes, we were.

Q. Did I not ask each of you your names and addresses and write them down on a piece of paper?

A. Yes, you did.

Q. And you gave me your name and address as 1096 Main Street, Macon; and Reverend Gillison gave his address as 671 Beckwith Street, Atlanta?

A. That's correct.

Q. After I got your names and addresses, isn't it true I told Reverend Gillison that it was a policy of the motel [fol. 60] not to accept people in general of any race from Atlanta for previous reasons of policy of the motel, and that since he said he was from Atlanta, he would be turned down on that basis?

A. I don't believe that was the exact wording of your statement.

Q. What did you understand I said?

A. My understanding of what you said was that "as far as you are concerned, Reverend Gillison, it's the policy of the motel not to rent rooms to any resident of Atlanta." You didn't mention the word "race."

Q. No resident of Atlanta we would rent rooms to?

A. That's correct.

Q. And I turned him down on the basis of him being a resident?

A. That was your—that was the reason you stated.

Q. Now you were turned down on the basis that you mentioned, that we had a suit pending in Federal Court and we wanted to await the outcome of that suit?

A. That's the reason you gave.

Q. Now Reverend Wells, how long have you lived in Atlanta?

A. How long have I lived where?

Q. In Atlanta.

A. My home is Macon, Georgia. I've lived in Macon, Georgia, for seven years.

Q. I'll ask you another way. How long have you worked [fol. 61] with the United States Post Office Department in Atlanta?

A. I have been in the United States Post Office approximately fourteen months.

Q. While you are working for the Post Office Department, you stay in Atlanta, I presume?

A. Yes. I'm—

Q. You don't commute every day, do you?

A. I'm in transit from Macon to Atlanta. My home is there. My church is there. My family is there.

Q. I ask you again, do you commute every day from Macon to Atlanta?

A. No, I don't commute every day from Macon to Atlanta.

Q. As a matter of fact, the day you came to the motel, you went to work for the Post Office Department about 4:30 that afternoon, didn't you?

A. That's correct.

Q. And you went to work for the Post Office Department at—the next day on Sunday about 4:30, didn't you?

A. That is incorrect. I don't work on Sundays. I'm a minister.

Q. You don't work Sunday?

A. I'm a minister. I don't work Sundays.

Q. If your job requires you to work on Sunday, do you work?

A. My job does not require me to work on Sundays. I'm a minister.

[fol. 62] Q. But you worked Saturday three hours after you came to the motel, didn't you?

A. That's correct.

Mr. Rolleston: That's all.

Judge Tuttle: You may go down. Any other witnesses, Mr. Barrett?

Mr. Barrett: No further witnesses.

Judge Tuttle: You may proceed with your argument, Mr. Rolleston. I understood you to say you had no witnesses.

ARGUMENT ON BEHALF OF PLAINTIFF BY MR. ROLLESTON

Mr. Rolleston: No witnesses.

May it please the Court, of course we filed a brief in this case and I certainly don't intend to go through the whole brief, in accordance with the rules of Court. I would like to state briefly our position without even arguing it as far as their motion is concerned. We have brought this suit in court under the declaratory judgment act, and under that act we believe the provisions are broad enough to include all of the prayers in the petition because the act says that in the case of an actual controversy—and we submit there is a controversy because of nothing else, regardless of the testimony, because of our announced intention—within this jurisdiction except in the case of federal taxes any court of the United States upon the filing of appropriate pleadings may declare the rights and other legal relations of any [fol. 63] interested party seeking such declaration whether or not further relief is or could be sought. And the fact that they have brought in their motion to dismiss the ques-

tion of the amount of damages we sought and limit of ten thousand dollars, should go to the Court of Claims, is one basis of their argument I'm sure, and they say we have no controversy.

Judge Tuttle: Let me—let me—

Mr. Rolleston: Yes, sir.

Judge Tuttle: —clarify one point. Of course, their motion to dismiss does go to the point of your including or undertaking to include a suit against the United States for damages. You don't, I believe, reach that point in your, in your brief that you filed.

Mr. Rolleston: No, sir; I didn't even touch on it.

Judge Tuttle: Well, it may help you to get a little—at least in my thinking on the matter it does appear to me that you cannot join a suit against the United States for damages on any theory with your suit for injunction because it's perfectly clear that even though your theory be right that your property is taken without just compensation, the Tucker Act does limit the District Court's jurisdiction to ten thousand dollars. You might file written briefs on that if you will, because I would hardly think it necessary to have further oral argument on that.

[fol. 64] Mr. Rolleston: Yes, sir. Of course, the other part of the act says that if the court takes jurisdiction and makes a decision in the declaratory judgment suit, they can render such other relief that is necessary. And that is the basis on which we are travelling. Of course, they have raised the point of sovereignty immunity. On that particular issue I'll simply state that if there has been a taking of property without just compensation, we don't have to ask permission of the United States Government to sue them because they are violating the Constitution, if they are.

Judge Tuttle: The Government is giving you that permission by giving you the right to sue in the Court of Claims if it exceeds ten thousand dollars.

Mr. Rolleston: As to the facts, Your Honor, before I get to the legal end of it—

Judge Tuttle: Yes.

Mr. Rolleston: —it is our position, and I'd like to state it very clearly, Number 1, whatever the order of this Court

or any other court is, Federal, State or any other court, this plaintiff corporation will obey.

Number 2, our policy had been to exclude Negroes on the basis of race from this motel before the passage and before the Act became law. Our policy since that time, we announced that, our policy since that time, we have announced that we would not take guests, because we filed [fol. 65] a suit within two hours after the law was signed into law, and on the theory that even though we recognize that any law is valid and, until declared to the contrary, once the matter is in the breast of the court, it was our interpretation that we could stand on whatever the court decided, and there was an early hearing set, and that was what we were standing on.

As far as the testimony of these witnesses, both of them actually live in Atlanta, Georgia. They may maintain their domicile somewhere else, but they are living in Atlanta, Georgia.

Judge Tuttle: Of course, you didn't take the witness stand to testify that you don't accept Atlanta residents in your motel; so this fact issue that you asked them about, one of them denied and the other said yes, as to one man it applied.

Mr. Rolleston: Yes.

Judge Tuttle: Does this become an issue in the case?

Mr. Rolleston: No, sir; but I want to make the point that, and I, it's important to me as a lawyer, that in my opinion the plaintiff corporation hasn't as yet been confronted with a situation where it had to make the choice whether it was obeying the law at this time because these people wouldn't have qualified anyway. We don't take white people from Atlanta except under very unusual [fol. 66] circumstances.

Judge Tuttle: Now isn't it undisputed evidence, and this is all there is so far, that one of the witnesses, that is, the first witness, that he was not asked—stated by you anything about the Atlanta policy. That's his testimony.

Mr. Rolleston: His testimony; yes, sir.

Judge Tuttle: That's undisputed.

Mr. Rolleston: But the other witness said that was made to him. That that statement was made to him.

Judge Tuttle: Yes, he did.

Mr. Rolleston: So you've got two witnesses; at least one heard it.

Judge Tuttle: Not testifying about the same situation, though.

Mr. Rolleston: Well, all—the only point I want to make, Your Honor, is I think we have been complying with the law up until now and just haven't had to be in the embarrassing position to make a decision.

As to the law in the case, and this is the important thing, the constitutionality of the Civil Rights Act of 1964 is, is really the only and the basic issue that this Court really needs to decide.

Judge Tuttle: This is why I'm wondering if you really just don't state that and say that the facts do bring you [fol. 67] within it and therefore the legal question is all we have to decide. You don't go quite that far as I understand it.

Mr. Rolleston: I think—I had hoped our petition brought us within the actual controversy part of the declaratory judgment act and I would like to state that that is our position so there won't be any conflict in the record.

Judge Tuttle: All right.

Mr. Rolleston: Of course, this act was put forth by the executive part of our government, two administrations. It's been debated at least by a number of really good lawyers who represent us in Congress. It is now the act of Congress; the legislative branch has passed on it; and the real question now is whether or not those two departments of the government have acted wisely and in accordance with the Constitution in passing this law.

Judge Tuttle: We don't deal with whether it's—

Judge Morgan: Whether it's wise?

Judge Tuttle: —wise or not, do we?

Mr. Rolleston: Well, I will go further and say "accurate and just," and a judicial interpretation has got to be put on it by the third party, this judicial branch of the government. No, they—they have the question of determining whether it's wise or not. This Court, I'll submit, has [fol. 68] only one question to determine, and that is whether it's in accordance with the law. But the courts can best

effect justice for all people by carefully preserving and observing our legal processes.

Really, there's only one issue that I'm—would rely on today, although I would like to discuss it briefly—discuss briefly all of the issues, and that is that where a United States Supreme Court decision on a subject has been handed down and still valid and unreversed, no court, State, local or any other, has the right under our Anglo-Saxon jurisprudence and judicial proceedings to reverse that other decision of the United States Supreme except the United States Supreme Court itself. That's really the basis. Of course, there's a lot of things been changed in the law. But when I was in law school, and every freshman law school man now, I think every member of the bar right now, and most every court, knows of that simple principle, that no court can reverse the United States Supreme Court except the Supreme Court itself, if, if it's a decision that is valid and fits the facts of the case before the court.

There's an old principle that we lawyers hear about, or adage anyway, "Beware of a man that comes into court with one case." I'm really here with one case.

Judge Tuttle: What you call a "white horse" case.

Mr. Rolleston: A "white horse" case. Whatever you want to call it. But I'm riding this "white horse," and that's [fol. 69] the civil rights case decided 109 U.S. Page 3 in 1883 involving the Civil Rights Act of 1875. I submit that this Court, regardless of how it will decide the constitutionality of the present law, is bound by that case.

Judge Tuttle: I think I should make it plain, when I said "white horse" case, of course lawyers know what I meant by it. The law students speak of a "white horse" case as a case that fits the facts and the law precisely.

Mr. Rolleston: Yes, sir. Yes, sir. You don't come in on a black horse, as the fellow said, on the front or back of it; you come in on a whole "white horse."

And this Court can't presume either, I submit, that the United States Supreme Court will reverse itself. That's up to them, whatever they want to do about it.

Now our act, if I may read just one paragraph of that previous act, previous Act of 1875 had only two sections and the second section, the penal section was about, if—if

it had been passed today it would really be a subject of controversy because it was a strong penal section. But the first section of the act is almost verbatim, the hundred some-odd years apart, to the act that was passed in the present Congress. And it reads that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of accommodations, advantages, [fol. 70] facilities and privileges of inns, public conveyances on land or water, theatres and other places of public amusement subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." And that's my one "white horse" case, because they have decided the same issue exactly which is presented by the Civil Rights Act of 1964.

Judge Tuttle: Now, of course, if you read that opinion carefully as I know you have, you'll find this language or something like this in it, "Neither party contends that this Act may be sustained by anything other than the Fourteenth Amendment to the Constitution," which of course means the court there stated that no one then contended that it could be sustained by the commerce clause. Now what has the Supreme Court of the United States done with the commerce clause since that time?

Mr. Rolleston: They have distorted it, may it please the Court.

Judge Tuttle: So that without doing violence to that decision, the court has now made it really inapplicable for anyone to argue that this Act, which is ostensibly placed, based on the commerce clause cannot be supported by the commerce clause rather than the Fourteenth Amendment.

Mr. Rolleston: Well, I have read the whole case, of [fol. 71] course, and I've cited a good portion of the decision in my brief,—

Judge Tuttle: You don't—

Mr. Rolleston: —but I—

Judge Tuttle: You don't recall that language?

Mr. Rolleston: Oh, yes; I recall the language referring to the commerce clause. As a matter of fact, the court in that part of the decision said, "We're not saying that it could not be decided on the commerce clause," but the deci-

sion held, the first part of it asked the question, "Has Congress constitutional power to make such a law?" And they made this statement, "Of course"—using the words "of course"—of course, this is a long time ago—"no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments"—meaning the Thirteenth, Fourteenth and Fifteenth Amendments. The commerce clause was in the Constitution and the Fifth Amendment was in the Constitution at that time.

Judge Tuttle: So the Court there did not pass on whether it could be sustained under the commerce clause. It said no one has contended it was supported under the commerce clause.

Mr. Rolleston: But here's the interesting part of the language which is the basis for what is said in the decision. "Such legislation cannot properly cover the whole domain [fol. 72] of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them." And we say that this really is the basis of this, of this Act. But the Court is not responsible for the consequences of its judgment, as to what happens to what you decide. It's only responsible it seems to me to uphold our judicial processes.

Now the commerce clause which is now the basis of the present act is the interesting thing, because this is an innocuous and simple little clause and all it said was, in the third clause, it says, "Congress shall have the power to regulate commerce with foreign nations among the several states and with the Indian tribes." That's all it said, and on that one little sentence we are about to change the government of the United States. We have a Fifth Amendment in the Constitution which guarantees that no person shall be deprived of life, liberty or property without due process. We have a Thirteenth Amendment in the Constitution that says there will be no slavery or involuntary servitude. We have a Fourteenth Amendment in the Constitution that says no state shall pass a law abridging the

equal rights of people of any color for any reason. And [fol. 73] yet, the Congress didn't rely on any of these amendments to the Constitution in passing this bill. It specifically relies on interstate commerce.

Judge Morgan: Don't you think a motel such as yours is in interstate commerce, Mr. Rolleston?

Mr. Rolleston: No, sir, I don't; and I'll proceed to say why. As a matter of fact, this bill—

Judge Morgan: Under the decisions of the Supreme Court?

Mr. Rolleston: Well, I've got three decisions in here that say to the contrary. This bill really, instead of being called the Civil Rights Act of 1964 should really have been called, named—and it's the biggest misnomer in history—The Extension of the Interstate Commerce Clause to eradicate State Legislatures. What commerce is now and what it was way back yonder are entirely different. But there are three cases cited in our brief. One involves taxicabs. One involves the Howard Johnson Restaurant. And one involves a bowling alley.

In the taxicab case, the facts were that people from out of the state—whether they were domiciled in Massachusetts and lived in Atlanta or not—people from out of the state came to the railroad station in Chicago, got off the train, got in a taxicab and either went to a hotel, office building or home. And the other part of the facts were the [fol. 74] very reverse, they started at their homes and office buildings and hotels, and went to the railroad station. And under the Anti-Trust Act which they were tried under, they held that the taxicab transporting that man to the railroad station or going vice versa, the taxicab company was not in interstate commerce. In the Howard—this was some time ago—but in the Howard Johnson Case, which was decided in the Fourth Circuit Court of Appeals, it's not the United States Supreme Court—and my theory, may it please the Court, as far as the controlling case on this issue in my first legal theory, of course, doesn't apply to interstate commerce or these other parts of my argument. But in the Howard Johnson case in 1959, they brought, a Negro attorney for the Internal Office—Internal Revenue Office brought a suit against Howard Johnson and said, "You

serve—you sit here on an interstate highway; you serve guests who are travelling in interstate commerce; and therefore you are in interstate commerce.” And they held that the Howard Johnson Restaurant was not in interstate commerce.

Judge Tuttle: Of course, there’s no congressional act there being construed by the court.

Mr. Rolleston: No, sir; but Judge asked me did I think we were in interstate commerce. We’ve got other decisions on similar facts—

Judge Morgan: What I based it on, isn’t there a number [fol. 75] of NLRB cases that have gone to the courts holding that hotels or motels except those residential motels were under the, subject to the NLRB wage and hour—

Mr. Rolleston: I don’t remember whether they have gone to the Supreme Court or not, Judge Morgan. Of course, you can find a case on any subject.

Judge Morgan: One went from the circuit court of appeals I believe to the Supreme Court, and certiorari, it was sent back to the court of appeals,—

Mr. Rolleston: Yes, sir.

Judge Morgan: —and since that time it’s been accepted, hadn’t it?

Mr. Rolleston: I’m sure you can find cases in the circuit court and in the Supreme Court to the contrary of these cases. There’s no question about it. But here are these cases, too.

Judge Morgan: All right. You go ahead. I didn’t mean—

Mr. Rolleston: Then there’s a case decided in 1963 in the State of New York by the Supreme Court of New York regarding a bowling alley. And in that case the bowling alley drew trade from interstate commerce; they advertised in interstate commerce, which they stipulated in the facts as we have; and they received equipment in interstate commerce. And they held that just because interstate travellers went to that bowling alley, the bowling alley was not [fol. 76] in interstate commerce. And the Howard Johnson Restaurant was not in interstate commerce. And the hotels that the people went to by taxicabs was not, could not be in my opinion in interstate commerce, if the man in the taxicab had ceased to be in interstate commerce when he got

in the taxicabs. That's the substance of it. But the trouble about this thing, and the reason I'm talking about interstate commerce so much is that what is the final conclusion if you are adopting the theory that Congress has now put on the word "commerce among the states?"

I will give you my example again. Suppose a man comes to Atlanta by airplane. That's the usual means of transportation now. He catches a cab into Atlanta; goes to the First National Bank and arranges for a construction loan. He goes to a local real estate company and signs a contract to buy a piece of land to build a building for his company on. The right usual thing happening today. He goes to a local contractor that doesn't ever step out of Fulton County hardly and makes a contract to build the building. He goes to the Commerce Club down the street and eats lunch. He is entertained at the Driving Club. At night he goes to the Wits End, and finally he gets to the Heart of Atlanta Motel. Do you mean to tell me that every one of those local businesses, except the First National Bank of Atlanta, every one of those local businesses has now become in inter-[fol. 77] state commerce because of the stretching of the word "commerce among the states?" I call it interstate commerce by infection, because it's just like a malaria mosquito jumping from one man to the next one; every victim is infected. And the logical conclusion—

Judge Tuttle: I think the malaria mosquito has one bite and then he dies.

Mr. Rolleston: I wish this man had just one bite. He would have bitten somebody long before he got to me. But in this case, if you drag that out to its conclusion, that because he is a man in interstate commerce, a traveller, if you can say the restaurant is in interstate commerce and the bowling alley and the taxicab and our motel, you can take every corner drugstore and put him in interstate commerce. You can take every lawyer who buys a pencil to run his business with, and he can't run his business without one; you can take every doctor who buys an instrument from Connecticut. You can take anybody who buys anything from another part of the country. That's what they are trying to do with "interstate commerce." And they'll put them all in interstate commerce. And the legislature might as

well go home and forget about reapportionment and don't ever come back because whatever they pass would be of no value and no good, if Congress has appropriated that field of legislation. As long as they don't, they haven't. But why [fol. 78] would you expect Congress not to? Has any government in our history ever had power to exert over legal situations and abandoned that power and given it up? If they ever got it, they keep on taking more.

Judge Tuttle: Since you asked that question, let me answer it for you. Congress in the Fair Labor Standards Act expressly saved out of the operation of the Fair Labor Standards Act retail establishments, local retail establishments, which is of course complete congressional restraint. The large retail establishments undoubtedly under decisions of the Supreme Court could be held by Congress to be within the stream of interstate commerce. But they have kept out of that by exempting local retail establishments.

Mr. Rolleston: Well, there's another case of it, Your Honor. Congress has kindly kept the hotel and restaurant industry out of the wage and hour law too, so far. But every time Congress meets—

Judge Tuttle: Not Congress, but the Labor Board.

Mr. Rolleston: Well, I was going to say every time Congress gets—every time Congress meets, Your Honor, they have a law, and have one pending right now, to put these other industries under wage and hour. And the only reason we are not there now, frankly, is that they bring in a great big act that covers everybody, and whoever puts up the biggest opposition they drop them out one time, and pass [fol. 79] the law. And next year, they've only got those two to work on and they get one of them; and then the next year, they get the last one, and finally they've got all of them, in interstate commerce, and under the wage and hour law, and under the Sherman Anti-Trust Law, and under NLRB; and then they've got everything that used to be private rights. This is really the gravamen of the case. This is the guts of it. This is really the reason we brought the lawsuit. We could get along with Negro guests. They would hurt our business as we've alleged, and it's true. We could get along with them. But the next step after this act, there may just be one more step, that's taking over all legis-

lation by Congress, so setting up the stage for a dictatorship in this country. I'm telling you, this extension of the commerce act to every man, woman and child in this room and in the United States, business and personal affairs, is not authorized by the Constitution.

The Fifth Amendment we've claimed is violated also. The Fifth Amendment says you can't take a man's liberty or property without due process; and you can't take it, his property without just compensation. Have they taken our liberty at the Heart of Atlanta Motel? We used to could say who could come there and who could not come there and we would turn them away for whatever reason we wanted. We don't have that liberty under the prohibitions of this [fol. 80] act if the act is good. We say that the taking of our liberty has been done by an act of Congress. It's the same liberty any other local individual has to run his business.

Judge Tuttle: Does the innkeeper traditionally have that same privilege?

Mr. Rolleston: Under, Your Honor, under the common law, the innkeeper did not have it, that privilege. But where the common law has been changed by statute—

Judge Tuttle: He had to take them all, did he not?

Mr. Rolleston: That's right. Under the common law he had to take everyone. But where the common law, as the Court know, prevails unless changed by statute. In Georgia the statute has changed the common law. In the 52nd—Chapter 52-101 defines what an inn is, and they say, "An inn includes all taverns, hotels" and so forth, and then the next chapter, it says, "Persons entertaining only a few individuals are not"—"Persons entertaining only a few individuals, or simply for the accommodation of travellers"—and the stipulation of facts in this case are that we take transient guests—"are not innkeepers, but depositaries for hire, bound to ordinary diligence." And then in another code section, Chapter 52-3 under "Tourist Courts" they define, it says, "This Chapter shall not apply to hotels and inns within the definition of" the previous chapter, and that [fol. 81] "Every person, firm or corporation engaged in the business of operating outside the corporate limits of any city or town in this State a tourist court, cabin, tourist

home, roadhouse, public dancehall or other similar establishment by whatever name called, where travellers and transient guests are entertained are not innkeepers." And they have another chapter, which says that a—52-401, which says that a tourist court shall include among other things motor hotels. And then they have a penal section in this chapter which says that motor hotels, for failing to do so and so about health are subject to penal things. All through this whole chapter motels and motor hotels are treated differently; they have to get a different license; there are different penal sections; and they are taken out of the definition of the innkeeper because the very act says so.

As to the Fifth Amendment, not only has our liberty been taken we claim, but part of our property rights. Any proprietary interest in the ownership of private property if interfered with where the owner can thereafter not exercise their right, if it is the result of a taking by a government, it is a taking of property under the law. The Fifth Amendment says property cannot be taken without due process. Certainly this Circuit Court, Fifth Circuit Court of Appeals has defined the due process just recently in the Hornsby Case this year and set up, as the Court is very [fol. 82] familiar with, that there must be a responsible hearing, based on evidence taken at a hearing where notice is given, witnesses there and witnesses to be cross examined, and only based on the evidence adduced at the trial. Has there been a hearing on the taking of our property, if there has been a taking?

Judge Tuttle: Well, you are talking about procedural due process and of course the passage by Congress of a constitutional law is due process. You are speaking of procedural due process in an administrative procedure, which is quite a different thing. You would not—

Mr. Rolleston: Your Honor,—

Judge Tuttle: You would not argue against the proposition that a statute which is constitutional complies with due process, substantive due process.

Mr. Rolleston: That is true. But I would say that a statute could be unconstitutional because it violates the

Fifth Amendment by taking private property without procedural due process. There's no procedural due process set up in the statute, and therefore it's void.

The other part of the statute says that property shall not be taken without just compensation. Of course, there's no compensation set up in the statute for the taking, if there is a taking. And I cite recent cases to the Court in the decisions, one of them from the—they are not Supreme Court cases, but in 1961 the Supreme Court of the State [fol. 83] of Washington, way out on the West Coast, held "this constitutional right of the individual not to be dominated as a private affair is predicated upon the theory that the greatest good for the greatest number can be best achieved by permitting the individual to choose his own course of action, conforming of course to the reciprocal rights of others." And in the other case, decided in 1959 in Washington, in the Cinderella Case, no truer words were ever spoken than these in that case when it says, "In dealings between men, both cannot be free unless each acts voluntarily; otherwise, one is subjugated to the will of the other."

As to the Thirteenth Amendment which we have attacked by amendment, the Thirteenth Amendment provided there be no slavery and no involuntary servitude. In our case, how can we say that we are subject to involuntary servitude? We say that we had the right to run the motel like we wanted to before the act was passed. We now have the right to run the motel like the Government says. Sure, we have the alternative of quitting and giving up a four million dollar business; but can that be required of a business by law? In the *Hodges versus United States* in 1906, some time ago, they held concerning the Thirteenth Amendment that slavery and involuntary servitude is denounced by the Thirteenth Amendment, meaning a condition of enforcement of compulsory service one to another. And while [fol. 84] the cause in citing that amendment was the emancipation of the colored race, it reaches every individual and every race.

In this Fifth Circuit Court of Appeals in 1944 in the *Heflin Case*, they say, Well, if you got paid for it, that's all right; that takes it out of the Thirteenth Amendment.

The case held whether the parent was paid little or nothing is not the question. It is not uncompensated service but involuntary servitude which is prohibited by the Thirteenth Amendment. Compensation for service may cause consent, but unless it does, unless it does, it is no justification for forced labor.

And the United States Supreme Court has held it requires no argument to show that the right to work for a living is, in the common occupation of the community, is the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure.

May it please the Court, our legal position is that there has been a case decided which is controlling on facts that are in this case and on a law which is almost exactly the same, and that the Court is bound in following our legal procedures to follow it and throw this case to the United States Supreme Court to do what they may. But at this stage of the game, it ought to go up there. And we claim, of course, that it violates the Fifth Amendment by the taking [fol. 85] of property and liberty without due process of law and without compensation; violates the Thirteenth Amendment involving involuntary servitude.

I would like to say one other thing, may it please the Court. The name of Kennedy will be, go down in history of all times regarding civil rights.

Judge Tuttle: Mr. Rolleston,—

Mr. Rolleston: John F. Kennedy—

Judge Tuttle: —is this proper argument?

Mr. Rolleston: Yes, sir; I think so. Just—

Judge Tuttle: We are not disposed to cut you off, but actually, what—what's proper about it?

Mr. Rolleston: Well, sometimes in the affairs of men it takes more than one individual to express a thing, and I want to quote a man. Mr. Robert Kennedy, the defendant in this case, wrote in the prefaced word to the Memorial Edition of the PROFILES IN COURAGE that the one thing that President Kennedy admired was courage. It took courage to pass this law. It took a little courage maybe to file a suit against the Federal Government. And I know this Court will follow the motto over the Supreme Court of Georgia's bench which says in Latin, when translated, "Let

justice be done though the heavens may fall." And I know this Court, if it agrees with our legal interpretation will do that in spite of the consequences which could arise out of [fol. 86] such a decision. And I thank you.

ARGUMENT ON BEHALF OF DEFENDANT BY MR. MARSHALL

Judge Tuttle: Mr. Marshall.

Mr. Marshall: May it please the Court, the United States has prepared a memorandum on the constitutional—

Judge Tuttle: I think you might almost call it a brief without exaggerating.

Mr. Marshall: Memorandum of points and cases. I've given a copy to Mr. Rolleston. We captioned the brief in the case involving Pickrick Restaurant as well as in this case for the sake of convenience.

Clerk: Have you got an extra copy, sir?

Mr. Marshall: Yes, sir. I think I can be relatively brief about this, may it please the Court.

The first point made by Mr. Rolleston turns on the civil rights cases which involve the constitutionality of a bill passed in 1875. As you mentioned, Judge Tuttle, it shows on the face of those cases that they were not deciding any question about the power of Congress to pass a law under the commerce clause. In addition to the language which you referred to, I would like to call the Court's attention to the later case of Butts against Merchant and Miners Transportation Company, which is 230 U.S. 126. It involved a private suit for damages under the 1875 Act, and it was based—argued that, that the act was unconstitutional under the commerce clause. The Supreme Court said in that case [fol. 87] that the civil rights act had not been passed under the commerce clause. The question of the constitutional validity of those sections was passed on only under the Fourteenth Amendment, and that it was held, they say, that the act received no support from the power of Congress to regulate interstate commerce because as is shown by the preamble and by their terms, they were not enacted in the exertion of that power. That case is cited in the brief. There are a number of leading—

Judge Tuttle: Do you deduce from that, the statement by the Supreme Court that an act may or may not be found

valid by it according to the theory or basis on which Congress sees fit to enact it?

Mr. Marshall: Well, Your Honor, I think under the commerce clause, Congress has to be regulating interstate commerce.

Judge Tuttle: Because that's the power that the Constitution gives to Congress, to regulate commerce.

Mr. Marshall. To regulate; that's right.

Judge Tuttle: Unless the Congress is actually seeking to regulate commerce, then it can't be said that the act would fit under that commerce clause.

Mr. Marshall: That's right. I think that's what the court meant, that Congress wasn't seeking to do that; therefore, the act couldn't be sustained under whatever power Congress had in attempting to do that. The 1875 acts were [fol. 88] based solely on the Fourteenth Amendment and to some extent on the Thirteenth and Fifteenth Amendments.

Judge Morgan: This civil rights act for this year is based on the commerce clause.

Mr. Marshall: There are provisions of it, Judge Morgan, which are not involved in this case, that are based on the Fourteenth Amendment.

Judge Morgan: Well, I was actually referring to these provisions,—

Judge Tuttle: Title II.

Judge Morgan: —public accommodations.

Mr. Marshall: No, not Title II. There are parts—

Judge Tuttle: Or both.

Mr. Marshall: —that are based on the Fourteenth Amendment. If you look at 201-B of the Act, you'll see that it says each of the following establishments which serves the public, if its operations affect commerce or if the discrimination or segregation by it is supported by State action, that was an exercise of power under the Fourteenth Amendment in terms of the sit-in cases where the Supreme Court has held that if the State requires segregation by private establishments,—

Judge Tuttle: I don't mean—I don't understand you to say that any part of it is not, is not based on the commerce

clause, but it is also in certain respects sought to be based [fol. 89] on the Fourteenth Amendment. Is that what—

Mr. Marshall: That's right, Judge Tuttle. But that's a very limited application. It's an application which is really designed to eliminate state compulsory segregation. The cases which I would refer the Court to that held generally on the power of the Congress under the commerce clause are four. There are others that are cited in our brief, but I think that four cases, starting in 1936, really set the bounds of the power of Congress to regulate commerce. One is the Jones and Laughlin Steel Corporation Case, 301 U.S. 1, decided in 1936 upholding the Wagner Act which in many ways had similarities to this piece of legislation in the sense that it was intended to deal with a national problem that had been marked by a good deal of emotion and controversy and even violence in the streets. The court said in that case that to regulate, in the course of regulation of commerce the Congress was not limited just to the regulation of institutions which are in the stream of commerce or which themselves move in commerce, like railroads and buses, and that kind of thing, but that it can regulate and pass legislation to eliminate burdens and obstructions due to injurious actions springing from other sources. That the Wagner Act of course regulated the relationships between employers and their employees within the plants where the plants, the operations of the plants affected commerce. And that, as you noted, Judge Morgan, has been recently in many cases applied to hotels, retail stores and other establishments that are local in the same sense that the Heart of Atlanta Motel is local.

Judge Tuttle: The Jones-Laughlin Case was the first decision by the Supreme Court that went so far as to hold that what had theretofore been considered purely local, like manufacturing, mining and farming and the like, might still be under congressional regulation. Is that—

Mr. Marshall: Well, Judge Tuttle, you say the first case. I think that the history of the commerce clause goes back to Gibbons against Ogden. I think that the decision in Jones and Laughlin and the following ones after that were in the keeping of the spirit and the view of congressional power which goes back to Justice Marshall's opinion in Gibbons against Ogden. There was a case in 1922 involving the

Packers and Stockyards Act which related to regulation of the stockyards in Chicago, and of course, that was local in a sense that it all happened in Chicago. The hogs came in and meat went out. But what was regulated was local activity.

There are three cases which held also that Congress also has the power to regulate intrastate activity if that is necessary to complete regulation of interstate commerce. Those are United States against Rock Royal Corporation, 307 U.S. 533. The United States against Darby, 312 U.S. 100, [fol.91] involving the Fair Labor Standards Act. And Wickard against Filburn, involving the Agricultural Adjustment Act. The last case, if you will recall, involved the regulation of a farmer who grew wheat on his own farm for consumption on his own farm, and the Supreme Court held that Congress had the power to reach that operation because of its involvement with the problem of wheat surpluses generally.

Judge Morgan: Wasn't it the old Schechter Case, wasn't that the Schechter Case and the court has been more or less distinguishing or, as you say, whittling at the doctrine laid down in 1935 or '36 in the Schechter Case since that time?

Mr. Marshall: I would say, Judge Morgan,—

Judge Tuttle: The Wickard Case—

Mr. Marshall: Wickard against Filburn. Also the Jones and Laughlin Case narrowed the Schechter Case very much; and there was a milk case I think involving Wrightwood Dairy, which referred to the Schechter Case and said something to the effect that its continuing validity was in doubt.

Judge Tuttle: The Schechter Case—

Mr. Marshall: I would say the Schechter Case is effectively overruled.

Judge Tuttle: I went—

Mr. Marshall: And I think also—

[fol.92] Judge Tuttle: It went largely as I recall it on the Supreme Court's decision that Congress was illegally giving legislative power to, to an administrative board.

Mr. Marshall: That's right, Judge Tuttle. It held that the—

Judge Tuttle: But in Butler—

Mr. Marshall: That the NIRA was an unlawful delegation of legislative power, which is also a doctrine which has been abandoned.

Judge Tuttle: I think every student recognizes that about 1936 in January after the Butler Case where they knocked out the Agricultural Adjustment Act, there was really a complete turn-around from that point on, the erosion if you would like to speak of it that way, was very effectively commenced. And this Jones-Laughlin Case was the first important decision after the United States lost the Butler Case.

Mr. Marshall: That's right, Judge Tuttle. I believe with the exception of the Jones and Laughlin Case, the other cases that I referred to as basic decisions, the Darby Case, the Rock Royal Case and Wickard and—Wickard against Filburn were unanimous. And of course in recent years since then there have been a number of decisions under the National Labor Relations Act and the Labor-Management Relations Act which have been unanimous; and—and mostly per curiam, upholding exertions of [fol. 93] jurisdiction by the National Labor Relations Board over what are effectively local businesses because what happens to these local businesses affects the interstate commerce.

Judge Morgan: The case I was referring to was the—I believe it was the Floridian Case. I don't know whether that went to the Supreme Court, but it was in regard to the Fair Labor Standards Act, and then went up, is my recollection.

Mr. Marshall: Is that case cited in your opinion?

Judge Morgan: I don't believe it's cited in any of the briefs. I read it recently.

Mr. Marshall: These cases hold that Congress has the power to regulate commerce not only in the sense that they can regulate things that move in interstate commerce generally, but that they can pass legislation that deals with problems that affect interstate commerce. Our brief sets forth four—and there may be more—but it sets forth four ways in which the problem dealt with in Title II could reasonably be considered by Congress to have affected interstate commerce so that it required congress-

sional action. And of course, as you noted, Judge Tuttle, it is not for this Court to decide whether Congress was wise in making that decision. It's a question of whether it had the power to make that decision.

Judge Hooper: Mr. Marshall, to what extent do the courts have the right to say when Congress has said a [fol. 94] certain act does affect commerce, what right do the courts have or do not have to say whether that factual assumption is correct? Now in the Jones and Laughlin Case, the court said this, among other things: Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them in view of our complex society would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Now what I'm interested in is whether under the Civil Rights Act, Congress says that a certain thing does affect commerce, is that conclusive on the court or is it, is it not?

Mr. Marshall: Judge Hooper, I do not think that any constitutional opinion of Congress is conclusive on the court. It's the responsibility of the courts to repass on the constitutionality of statutes the Congress thinks are constitutional. But I think that the findings of Congress in a matter like this are entitled to very very great weight, and that at least—

Judge Tuttle: Substantial fact findings.

Mr. Marshall: That's right, Judge Tuttle. It is fact findings, and they are based on the record and hearings. The matter was under consideration by Congress for over [fol. 95] a year. It was debated at great length. It is an issue and a problem that involves great emotions. There are great political problems with it. And all of that went into the determination by the Congress to deal with it, Judge Hooper. The decision of Congress on that was made by men that included very conservative men as well as very liberal men. And I think that that kind of a decision is entitled to great weight and has been given great weight by the Supreme Court except for a very brief period really extending maybe ten years from around 1925 to 1935.

Judge Hooper: Well, you see, in the instant case it's stipulated that the Heart of Atlanta, 75% of its business is transient, which is right substantial. But suppose you later have a case where it's almost negligible, the number of people who are in commerce who go there is almost negligible. In that type of case—I was just thinking about the precedent of this case—in that kind of a case, where would the courts draw a line between what is substantial and what is not substantial?

Mr. Marshall: Judge Hooper, the—in dealing with a hotel, which this case does, the Act does not require the court to draw that. Congress has made that determination. It defines the hotels covered by that Act in Section 201-B-1 and 201-C Subsection 1. And it includes all inns, hotels, motels or other establishments which provide lodgings to [fol.96] transient guests. All of them. It is not a question substantially under the Act. Now the question is, can Congress do that? Can Congress make that factual determination that in order to deal with the problem they have to regulate all hotels,—

Judge Hooper: Sir, do not all hotels furnish lodgings to transient guests?

Mr. Marshall: I would think so, Judge Hooper, or virtually all of them.

Judge Tuttle: Do you have ready reference to any Supreme Court Case that I think states this proposition, something along these lines, that when a determination is made by Congress on—of this nature, the courts are required to support it if there's any reasonable relation to the determination by Congress to the problem that it seeks to legislate on?

Mr. Marshall: I think that's right, Judge Tuttle. I think that—

Judge Tuttle: I think that's the principle. I don't have the case.

Mr. Marshall: I think the principle goes back to Gibbons against Ogden. I think—

Judge Tuttle: So that what—

Mr. Marshall: I think that language can be found in Gibbons against Ogden.

Judge Tuttle: So that what we are required to do is [fol. 97] to determine whether there was any reasonable basis for Congress to ascertain that the hotel industry reasonably affects interstate commerce.

Mr. Marshall: Yes. And this problem I think, Judge Tuttle, not only the hotel industry, but this problem within the hotel industry of racial discrimination,—

Judge Tuttle: Yes.

Mr. Marshall: —could Congress reasonably have made that determination. I think that's the question.

Judge Tuttle: That this would be and have an adverse effect on interstate commerce.

Mr. Marshall: That's right. In the Darby Case, Judge Hooper—no, I'm sorry. It's in Wickard against Filburn, where there is no question but that the activities of the farmer who was regulated, that particular farmer, were intrastate. He grew wheat on his own farm for consumption on his own farm. He grew more wheat than the quota that was allowed him under the Agricultural Adjustment Act. The question was whether Congress had the power to regulate that farmer, that particular farmer and the court held unanimously that he did—that Congress did. And among other things, it said, the court pointed out, citing Gibbons against Ogden, that effective restraints on the exercise of this power must proceed from political rather than from judicial process. I think our system works that way. If Congress is arbitrary and unreasonable [fol. 98] and the court can make that determination that there is an arbitrary or unreasonable relationship between what Congress was trying to do and some, some commercial problem affecting interstate commerce, then I think it would be the court's duty to strike down the act. But unless it can make that determination, I think it's up to Congress to—

Judge Hooper: You are saying that it is not necessary under this statute as to hotels to show that they take any transients moving in commerce, in interstate commerce.

Mr. Marshall: It has to be shown they take transients, Judge Hooper.

Judge Hooper: Transients.

Mr. Marshall: But it does not have to be shown that the transients in a particular case moved in interstate commerce.

Judge Hooper: Oh, no. We are not talking about the same thing. I realize that, but—

Mr. Marshall: But transients, Judge Hooper,—

Judge Tuttle: Because the definition in this act—

Mr. Marshall: In this act.

Judge Tuttle: —is interstate commerce.

Mr. Marshall: In this act.

Judge Hooper: Any number, any amount of transients.

Mr. Marshall: Yes, that's right.

[fol. 99] Judge Hooper: Transients, that means people who are moving in interstate commerce.

Mr. Marshall: No, Judge Hooper. Not necessarily. It means people that are moving, it means that the hotel is, the hotel caters to transients. That is, it isn't a residential hotel. The people that stay there don't live there as residents. It takes in people that usually come from some other place, but the some other place does not under the Act, Judge Hooper, have to be shown to have been another state.

Now as I said, these cases, the Darby Case, the Rock Royal Case, and Wickard against Filburn expressly hold that Congress has the power to reach some activities that are completely intrastate if they have to do that in order to control a problem, deal with a problem that they properly can deal with under the commerce clause. And those holdings of those cases in turn go back to the Shreveport Rate Cases in 1914 where the question of the validity of an order of the Interstate Commerce Commission over purely intrastate rates in Texas was involved. And that was upheld by the Supreme Court in the Rate Cases in 1914. And these cases carry that on, Judge Hooper.

Our brief sets forth and suggests four ways in which Congress could reasonably have made a determination that this was a commercial problem that they should deal with under their power to regulate interstate commerce. One is [fol. 100] simply the burden on Negro travellers. This is a problem that Congress has dealt with before, dealt with it in the Interstate Commerce Act and dealt with it in the Federal Aviation Act. And those have been upheld unani-

mously. This Court upheld the, the validity of Interstate Commerce Commission rules that were to deal just with that problem in restaurants in bus stations. The problem of the discrimination against Negro travellers moving through the country. So that is one thing by itself that I think Congress had the legitimate, reasonable power to deal with and to determine that in order to deal with that they had to deal with all hotels.

Judge Tuttle: Let's say then, do you take the position then on that point that if it is, if we find that Congress could have determined that the mere interference with the travel of Negroes by reason of these restrictions, it would be sufficient to sustain the Act on that ground?

Mr. Marshall: I think so, Judge Tuttle.

Judge Tuttle: And that is because the courts have held, including this court, or three-judge court I guess, it's a local—

Judge Morgan: Same court.

Judge Tuttle: It's a local district court,—

Mr. Marshall: I think it was this court.

Judge Morgan: Same court.

Mr. Marshall: I think it's the same court.

[fol. 101] Judge Tuttle: That the, that the interstate commerce rule prohibiting discrimination between white and Negro passengers in a bus station, and including the restaurant, would in no—would be justified—

Mr. Marshall: That's right.

Judge Tuttle: —because that would be a burden on interstate commerce.

Mr. Marshall: Judge Tuttle, you will recall those rules weren't limited to interstate travellers.

Judge Tuttle: That's right.

Mr. Marshall: In fact, the court had that, the Fifth Circuit had that up in Baldwin against Morgan involving the Birmingham—

Judge Tuttle: Involving the Birmingham railroad station.

Mr. Marshall: It applied to anyone that comes into the bus station, and it was reasonable for Congress to feel that that was the way they had to deal with bus stations

in order to deal with the problem of discrimination against Negro travellers.

Judge Morgan: Of course, in that—in those cases we dealt with the franchise—I mean the bus companies and so forth had a franchise. I know the principle was intra-state affected interstate. I think that's the way the State of Georgia brought the petition, as I recall.

Mr. Marshall: That's right, Judge Morgan. I mean this [fol. 102] is different, but this goes further; but the type of regulation by Congress going back to 1887 is exactly the same. It was the prohibiting of discrimination in local restaurants because the local restaurants were connected with an interstate bus system and therefore served at least some interstate travellers.

Judge Morgan: That's right.

Mr. Marshall: Another reason that Congress couldn't—could choose to deal with this under its interstate power, interstate commerce power is to move artificial, remove artificial restrictions on markets. And it has regulated essentially local businesses for that reason before. One that occurred to me is in the, under the antitrust laws. There have been a number of cases involving movie theatres and the question of movie theatres allocating runs between themselves and fixing admission prices on tickets. Now that's a, an artificial restriction on who can see a movie when in the local theatre. The movie goes—moves through interstate commerce. So that these restrictions in hotels and in this case in restaurants, and in theatres, is something which restricts the market for goods that move in interstate commerce. The food that goes into a restaurant, if the market is limited to white, that restricts the market artificially. Same thing with a film that moves in interstate commerce. If it is shown in the theatres and Negroes are [fol. 103] not permitted in the theatre, that is an artificial restriction on the market for that commodity that moved in interstate commerce. As I say, under the anti-trust laws, under the Federal Trade Commission Act, Congress has dealt, regulated with this sort of artificial restriction on markets. In this case, in terms of race, but it's the power of Congress to deal with it.

Another one which I think is analogous as I said before to the Wagner Act is to deal with the causes of disputes that affect interstate commerce. The hearings before the Commerce Committee of the Senate included a great deal of material on the economic effect of disputes over discrimination in places of public accommodations. The City of Birmingham, even here in Atlanta, in many many cities while Congress was considering this, there were economic effects on the business generally in those cities developing from the disputes over this. And Congress chose to deal with that through law, through regulation in the same way that it chose to deal with labor disputes under the Wagner Act in the Thirties:

And finally, and it's sort of a corollary point, I think that these disputes and the discrimination generally could reasonably be decided by Congress to have affected arbitrarily in some adverse system against Southern States particularly, the allocation of resources within the country, the decision of where to put industrial plants, the decision [fol. 104] of where to locate hotels, that kind of decision which affects the commerce of the United States very deeply and particularly in some of the states in the United States; it's also a problem I think Congress felt it had to deal with and reasonably felt that it should deal with.

There are a couple of specific cases I wanted to call the Court's attention to by the Supreme Court on this question of regulating local business. One is the Sullivan Case, 332 U.S. 689. That held a drugstore violated the Food, Drug and Cosmetics Act by taking pills out of one box and putting them into other boxes, inside the store, and then selling these other boxes without the labels, properly. That was a very local operation. He bought the pills, and they stopped in the store, and they were reboxed in the store and then they were sold, all in the store. And that—

Judge Tuttle: The Food and Drug Act is entirely dependent upon the commerce clause, isn't it?

Mr. Marshall: Yes, it is, Judge Tuttle. I think in one of these cases, I believe it's in the Darby Case, that—that the courts, court said that Congress may exercise the commerce power to prevent injuries to the public health, morals or welfare. That the fact that they are doing something else,

that they are advancing the cause of justice or meeting a [fol. 105] problem of health, morality or public welfare by regulating commerce doesn't make the regulation invalid.

Judge Hooper: Well, has the Supreme Court said on several occasions that the general welfare clause is a matter of state law and not the federal law; that the welfare clause has to be construed in the light of the specific powers which are given to Congress?

Mr. Marshall: Well, Judge Hooper, I did not intend to put any emphasis on the separate power of Congress under the general welfare clause. I said that in regulating commerce, in regulating commerce and in their exercise of that power, their purpose—this is what they said in *Darby*—could include such purposes as to promote public health, promote—

Judge Hooper: Oh, surely.

Mr. Marshall: —public morals or promote public welfare.

Judge Hooper: Right.

Mr. Marshall: And the fact is that a great deal of legislation passed under the commerce clause does that. The Food and Drug Act, that's mainly a health measure. I mean it's done by regulation of commerce, but it is dealing with the problem of health. The Meat Inspection Act; the Poultry Products Inspection Act; the Plant Quarantine Act; Packers and Stockyards Act as I mentioned before which was held up—upheld in 1922; Fair Labor Standards [fol. 106] Act; the whole Wagner Act; and of course, the Mann Act and other things that are more direct, on that sort.

The—I think that these cases, the other two cases I particularly wanted to call the Court's attention to on this question of local businesses was the *Chevrolet Dealer Case*, which is an NLRB case, which is cited in our brief, regulation of a Chevrolet dealer who bought his cars from a plant inside the same state; and the *Reliance Fuel Oil Corporation Case*, which is a recent case, unanimous case by the Supreme Court in 371 U.S. 224. *Shubert Case* under the anti-trust laws which regulates legitimate theatres through anti-trust laws, but it's local cases. There are others, but—and there are others cited in our brief in-

cluding a number of cases that deal with regulation of hotels and this kind of establishments, hotels and restaurants.

That brings me to the question of whether there's some limitation in the Fifth Amendment or the Thirteenth Amendment on this power of Congress under the commerce clause, I think it's really the same question, that if Congress has the power under the commerce clause to regulate and the regulation doesn't involve the taking under the Fifth Amendment and isn't prohibited by the Thirteenth Amendment, the, I just want to suggest to the Court some of the implications of the argument that this is a taking. [fol. 107] In the first place, it seems to me that the same argument would apply to the ICC rules, to the Boynton Case, to the Federal Aviation Act, to all the regulation under those statutes which have already been passed on.

Judge Morgan: The Food and Drug Act.

Mr. Marshall: The Food and Drug Act. But these are the same kind, Judge Morgan, is my point. The Boynton Case involves exactly the same kind of regulation. If it's a taking of the Heart of Atlanta, it must be a taking of that restaurant in Virginia that was involved in the Boynton Case. The same thing is true of a restaurant in an airport. That's regulated in the same fashion under the Federal Aviation Act and I don't see how you could make the distinction based on the Fifth Amendment between that and this. And, you could say maybe commerce power doesn't extend to this and it does to that, but that's a different argument. This is that the Fifth Amendment itself is a limitation.

The Thompson Restaurant Case in the District of Columbia, if the Fifth Amendment prohibits this sort of regulation by the Federal Government, then the Thompson Restaurant Case which was unanimously decided by the Supreme Court upholding a prohibition against racial discrimination in restaurants and hotels in the District of Columbia must have been wrongly decided. The Fifth Amendment is applicable in the District of Columbia. The [fol. 108] practice prohibited or regulated by Congress is exactly the same. The kinds of establishments covered are exactly the same. The cases that deal with this are mostly

cited in our brief, but the point I wanted to make, in addition to that there are thirty states that have laws that impose this sort of regulation.

The Fourteenth Amendment also prohibits the taking of property without due process, and if it is a taking under the Fifth Amendment, it seems to me that the argument goes to all of these state laws.

Judge Tuttle: Have any of the state supreme courts held invalid this kind of open, open accommodations statutes under the Fourteenth Amendment except the Washington decision?

Mr. Marshall: Well, Judge Tuttle, the Washington decision dealt with an open occupancy housing statute.

Judge Tuttle: I understand.

Mr. Marshall: I believe that the, the opinion that is cited in the plaintiff's brief is a concurring opinion that the—

Judge Tuttle: But they did—

Mr. Marshall: —decision—

Judge Tuttle: —knock out the statute?

Mr. Marshall: They did, Judge Tuttle; but I think it was in terms of the distinction made in the statute between publicly financed housing and other housing.

[fol. 109] Judge Tuttle: Do you know of any supreme court in—any supreme court in any of the states of the United States that have held unconstitutional open accommodation statutes?

Mr. Marshall: No, I do not, Judge Tuttle. A number of them have been upheld, and there's a decision by the Supreme Court of the United States, unanimous, that upholds the validity of the Michigan Statute. That's the Bob-Lo Excursion Company, which is in 333 U.S.

In addition, this point that I have been making about the Fifth Amendment not being an additional limitation but sort of the other side of the coin is made in the case called Bowles against Willingham which involves the price regulation, which was argued in the taking of property under the Fifth Amendment. In that case, the court said this: A member of the class which is regulated may suffer economic losses not shared by others. His property may

lose the utility and depreciate in value as a result—as a consequence of regulation; but that has never been a barrier to the exercise of the police power, citing some state cases, and the restraints imposed on the national government in this regard by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth Amendment. And then they cite some other cases involving federal regulations.

Our brief also cites a case called Central Eureka Mining Company decided in 1958 in which the argument was made that the closing of a gold mine under regulations on the sale and use of gold in this country was a taking, and the court held that that closing of the mine was not a taking under the Fifth Amendment, in view of the power of the Congress to deal with the problem.

That's all.

CLOSING ARGUMENT ON BEHALF OF PLAINTIFF
BY MR. ROLLESTON

Judge Tuttle: Mr. Rolleston?

Mr. Rolleston: If the Court please, I believe I have the closing,—

Judge Tuttle: Yes, sir.

Mr. Rolleston: —and I'll be very brief.

Judge Tuttle: Yes, sir.

Mr. Rolleston: Judge Hooper asked about the Act and what is really said. I'd like to point this out, that the Title II says that the Act covers any described establishment if it affects commerce. And then it says in the next wording, it says any of the ones listed in these subparagraphs One through Four affect commerce. So you have to look at the subsection, and it says any inn, hotel or motel or other establishment which provides lodging for transient guests. So under that interpretation I would say that any motel in the United States that takes a transient guest is covered by the Act.

Judge Tuttle: Unless it has less than five.

Mr. Rolleston: Unless it has less than five. Yes, sir. [fol. 111] Now the facts in the case stipulated that the Heart of Atlanta Motel takes transient guests, and seventy-five percent of them, Judge Hooper, come from outside of

Georgia; and that the rest of the transients, they can be transients even in Georgia if they come from Savannah to Atlanta.

Judge Tuttle: So more than 75% are transients.

Mr. Rolleston: You can almost say under our announced policy practically a hundred percent of them are transients. But 75%, the part that we are trying to stipulate, came from outside of Georgia. So this Act then must be, must be taken to mean that any motel except the one the man lives in and has only five rooms, which isn't a motel; that's just a house where they take lodgers; that any motel as such or any hotel—and there are sixty thousand motels in the United States, if they take one transient guest, they are covered by this Act. And I'm, I'll state to the court, and I'm, I'm sure the Court will almost take judicial notice, there isn't a motel or hotel in the United States that doesn't take transient guests, so they are all covered by the Act. What it amounts to.

Now I would like to call the Court's attention also, it says for the purposes of this Act, which is Section II, commerce, in quotes, means travel, trade, traffic, commerce, transportation and communication among the several states. [fol. 112] Taken literally, that could mean that the Congress of the United States can control communications of individuals between the States. You say that's a far-fetched conclusion? When the commerce clause historically was put in the Constitution, it was put there because under the confederation that this government operated under for twelve years after the War of Independence before the Congress adopted—before the Constitution was adopted in the Constitutional Convention, for twelve years there was practically no trade between these States that had any order, and that is the reason the commerce clause was, as I understand it, put in the Constitution, to regulate trade between the States. That's the history of it. Now we have seen the commerce clause by all the cases I have cited and other counsel have cited for the Government in the various ways they have nibbled and nibbled and nibbled until they have taken the whole piece of cheese. And this is the last step. There isn't anything left of inter-

—intrastate commerce if this Act can be valid and enforced to the full extent, and it will be literally followed, I'll urge on the Court.

The one other point, counsel mentioned that the United States Supreme Court has recently upheld a Michigan decision upholding the Michigan public accommodations law. They did so, though, on the grounds that a state may pass such legislation, pass such valid law, but not the Congress. [fol. 113] Under the Fourteenth Amendment—it follows the ruling in the civil rights case which said the Fourteenth Amendment didn't prohibit a state from doing it, but the Congress couldn't do it.

Thank you.

Judge Tuttle: Anything further on either side? Well, for once counsel were not overly optimistic. We have a little time to spare. But we've announced the next case will be called at one o'clock—

Judge Morgan: One-thirty.

Judge Tuttle: Did we say one-thirty?

Judge Morgan: I believe so.

Judge Tuttle: One-thirty. The Court will take this case under advisement and announce the decision as promptly as possible. I'll ask this question, although this is a motion I guess for preliminary injunction, is there anything further to be proved or further argument to be made? Could this not be considered a final motion and trial on the permanent injunction? What do counsel have to say about that?

Mr. Rolleston: As far as the plaintiff is concerned, there's nothing else, Your Honor.

Mr. Marshall: We are in agreement on that, Judge Tuttle. I think the whole case is before the Court now.

Judge Tuttle: The Court will stand in recess until one-thirty.

[fol. 114] (Whereupon, Court was recessed at 11:10 a.m.)

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 115] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 9017

HEART OF ATLANTA MOTEL, INC., a Georgia corporation,
Plaintiff,

—versus—

THE UNITED STATES OF AMERICA and ROBERT F. KENNEDY
as the Attorney General of the United States, Defendant.

OPINION—July 22, 1964

This is a complaint filed by Heart of Atlanta Motel, a large downtown motel in the city of Atlanta, regularly catering to out of state guests, praying for a declaratory judgment and injunction to prevent the Attorney General of the United States from exercising powers granted to him under the Civil Rights Act of 1964, 42 U. S. C. A., Section 1971, as amended. The suit also attempts to obtain recovery from the United States for substantial damages alleged to result from a partial taking of the complainant's property without just compensation.

Conceding, as it does, that it is regularly engaged in renting sleeping accommodations to out of town guests, seventy-five percent of whom come from without the state of Georgia, and that it "has refused and intends to refuse to rent sleeping accommodations to persons desiring said accommodations, for several different reasons, one of which is based on the grounds of race, unless ordered by this Court to comply with the provisions of the Civil Rights Act of 1964," the suit attacks the constitutionality of the public accommodations sections of the Civil Rights Act as applied to such a motel.

Since this is a suit seeking an injunction against the enforcement of a Federal statute on the alleged grounds that it is in violation of the United States Constitution, a three-judge court was convened as provided for in 28 U. S. C. A., Section 2282.

[fol. 116] The Attorney General filed a counterclaim seeking, on behalf of the United States, a temporary and permanent injunction against future violation of the Civil Rights Act by the plaintiff. The case was set down for hearing, and after the introduction of oral testimony on behalf of the United States, the signing of stipulations between the parties, and oral statements made by counsel for the plaintiff in open court, it appeared that no factual issues remained. The parties also conceded in open court that the matter might be treated as a hearing on the petition for the final permanent injunction.

In the first place, the claim of the plaintiff for damages against the United States on the alleged ground of deprivation of property without just compensation alleges no grounds for relief, entirely aside from the question whether such alleged deprivation would be justified by reason of the power of Congress to enact this particular legislation. This is so, because such a claim for damages or recovery for value of property taken by the Federal Government must be asserted in the United States Court of Claims unless the amount sought is not in excess of \$10,000. However, in the view we take of the law, such a suit is not maintainable in any event.

The real question presented by this complaint and counterclaim is whether Section 201(a), (b), (1) and (c) is constitutional.¹

¹ "Sec. 201.(a). All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin.

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning

[fol. 117] In substance, this section of Title II declares the right of every person to full and equal enjoyment of the goods, services and facilities of any hotel or motel which provides lodging to transient guests if it contains more than five rooms for rent or hire. The section is a congressional ascertainment and declaration of the fact that such "an establishment affect(s) commerce within the meaning of this Title."

Article I, Section 8, of the Constitution provides:

"Clause 1: The Congress shall have power . . . Clause 3: to regulate commerce with foreign nations and among the several states, and with the Indian tribes;" and Clause 18 "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers"

In *United States v. Darby*, 312 U.S. 100, 118, the Supreme Court said:

"The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the grant of power of Congress to regulate interstate commerce. See *McCullough v. Maryland*, 4 Wheat 316, 421."

of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

"(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b);"

Thus, it need not be decided whether the outlawing of racial discrimination by a hotel accepting transient guests may be justified on the ground that it is actually in the stream of commerce. The power of Congress, when that body seeks to occupy the full extent of its powers under the Constitution, "extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to . . . the exercise of the granted power of Congress to regulate interstate commerce." Of course, the initial determination of whether the challenged regulation is such "appropriate means" is for Congress. Courts may not overturn such determination unless they conclude that under no reasonable theory could Congress find them "appropriate to the attainment" of its power to regulate commerce.

This Court, as recently as July 10, 1964, in the case of *Marriott Hotels of Atlanta, Inc. v. Heart of Atlanta Motel, Inc.*, C.A. No. 8832, held that the operations of Heart of Atlanta Motel (1) are in the stream of commerce, and that, in any event, (2) such operations affect commerce so as to [fol. 118] subject it to Congressional regulation under the Sherman Antitrust Act. It being undisputed that in the adoption of the Civil Rights Act of 1964, Congress has seen fit to exercise its full power as granted it under the Constitution the scope of its operation in this field must, therefore, be taken to be at least as broad as that which it exercised in the adoption of the Sherman Act. Its scope is, therefore, also as broad as in the legislation affecting labor relations under the National Labor Relations Act. It is broader than that exercised by Congress in its regulation of wages and hours of services under the Wage and Hour laws.

In the specific field of hotel operations, the Supreme Court has ruled that the National Labor Relations Board could not lawfully follow a policy of refusing to take jurisdiction over unfair labor practices and other labor disputes in hotels and motels as a class. *Hotels Employees Local No. 255 v. Leedom*, 358 U.S. 99. Following that decision, the Court of Appeals of this judicial circuit in *N.L.R.B. v. Citizens Hotel Co.*, 5 Cir., 313 F. 2d 708, overruled a con-

tention by the Citizens Hotel Company, operator of the Texas Hotel in Fort Worth, Texas, that its operations did not fall within the constitutional reach of the National Labor Relations Act because it was not either engaged in commerce, nor did its operations affect commerce. In arriving at that decision the court referred to the Supreme Court's opinion in *National Labor Relations Board v. Reliance Fuel Oil Corp.*, 371 U.S. 224. That case dealt with an attack by the local fuel oil corporation on the jurisdiction of the Labor Board because, while most of the products sold by Reliance had been acquired from Gulf Oil Corporation and had been delivered to it from without the state of New York, they nevertheless had been received and stored in the state before sales were made to Reliance. It was thus contended that Reliance was not engaged in commerce nor were its operations such as to affect commerce within the constitutional sense. The Supreme Court said:

"That activities such as those of Reliance affect commerce and are within the constitutional reach of Congress is beyond doubt. See e.g. *Wickard v. Filburn*, 317 U.S. 111."

The opinion also significantly quoted from the court's earlier decision in *Polish Alliance v. Labor Board*, 322 U.S. where, at page 648, it had said:

[fol. 119] "Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local, but in the interlacings of business across state lines adversely affect such commerce."

It is clear that the attack by the complainant on the constitutionality of these sections of the Civil Rights Act must fail. It is equally clear that the United States is entitled to the injunction prayed for by it in its counterclaim. An injunction will issue in the following terms:

[fol. 120]

ORDER—July 22, 1964

The plaintiff, Heart of Atlanta Motel, Inc., a corporation, its successors, officers, attorneys, agents and employees,

together with all persons in active concert or participation with them, are hereby enjoined from:

(a) Refusing to accept Negroes as guests in the motel by reason of their race or color;

(b) Making any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities, privileges, advantages or accommodations offered or made available to the guests of the motel, or to the general public, within or upon any of the premises of the Heart of Atlanta Motel, Inc.

So that the plaintiff may have an opportunity to prepare its record for appeal and, if so advised, seek a stay of this order, it is Ordered that the foregoing injunction shall become effective twenty (20) days from the date hereof, on, to-wit, the 11th day of August, 1964.

This 22nd day of July, 1964.

Elbert P. Tuttle, United States Circuit Judge, Frank
A. Hooper, United States District Judge, Lewis R.
Morgan, United States District Judge.

[fol. 121]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 9017

[Title omitted]

PERMANENT INJUNCTION—July 23, 1964

Pursuant to Order and Directions by the Three-Judge Court in the above stated case, and pursuant to Rule 58 of the Rules of Civil Procedure as amended January 21, 1963, the following Order in the above stated case on the prayers for temporary injunction is hereby entered.

ORDER

The plaintiff, Heart of Atlanta Motel, Inc., a corporation, its successors, officers, attorneys, agents and employees, together with all persons in active concert or participation with them, are hereby enjoined from:

(a) Refusing to accept Negroes as guests in the motel by reason of their race or color;

(b) Making any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities, privileges, advantages or accommodations offered or made available to the guests of the motel, or to the general [fol. 122] public, within or upon any of the premises of the Heart of Atlanta Motel, Inc.

So that the plaintiff may have an opportunity prepare its record for appeal and, if so advised, seek a stay of this Order, it is Ordered that the foregoing injunction shall become effective twenty (20) days from July 22, 1964, to-wit, the 11th day of August, 1964.

This the 23rd day of July, 1964.

B. G. Nash, Clerk of Court.

[fol. 123]

[File endorsement omitted]

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 9017

[Title omitted]

NOTICE OF APPEAL—Filed July 22, 1964

Notice of Appeal of the decision of this Court in the above styled case dated July 22, 1964, to the Supreme Court of the United States is hereby given.

This 22nd day of July, 1964.

Moreton Rolleston, Jr., Attorney for Plaintiff.

[fol. 124] Certificate of Service (omitted in printing).

[fol. 125] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION,

Civil Action No. 9017

[Title omitted]

AMENDED NOTICE OF APPEAL—Filed July 30, 1964

On July 22, 1964, plaintiff in the above styled case filed a Notice of Appeal. Plaintiff amends said notice as follows:

A.

1. Heart of Atlanta Motel, Inc., plaintiff in the above styled case, is the party taking the appeal.

2. On July 22, 1964, the three-judge court consisting of Judge Elbert P. Tuttle, Judge Frank A. Hooper and Judge Lewis R. Morgan, rendered a judgment in the above styled case and said judgment was entered of record on July 23, 1964 by B. G. Nash, Clerk of Court. This appeal of the plaintiff in the above styled case is from said judgment of said Court.

3. This appeal to the Supreme Court of the United States is taken under the statute known as the Civil Rights [fol. 126] Act of 1964. Section 101, sub-section (h) provides as follows:

"An appeal from the final judgment of such Court (a three-judge court referred to in said sub-section), will lie to the Supreme Court" (parentheses added).

B.

4. The following portions of the record should be certified by the Clerk of the U.S. District Court, Northern District of Georgia, Atlanta Division, as necessary for this appeal:

(1) The Complaint for Declaratory Judgment, filed by the plaintiff on July 2, 1964.

(2) Amendment to Complaint for Declaratory Judgment, filed by the plaintiff on July 15, 1964.

(3) Statement of Issues, filed by plaintiff on July 15, 1964.

(4) Stipulation of Facts, agreed to by attorneys for plaintiff and defendants on July 16, 1964 and submitted to the Court at the hearing on July 17, 1964.

(5) Answer of the defendants, including Defenses and Counter-claims.

(6) Answer to Counter-claims and Response to Motion for Preliminary Injunction, filed by plaintiff on July 15, 1964.

(7) Certificate and Request for Three-Judge Court, filed by defendants.

(8) Notice of Motion and Motion for Preliminary Injunction, filed by defendants.

(9) Motion to Dismiss Second Counter-claim, filed by defendants.

(10) Notice of Motion and Motion to Dismiss, filed by defendants.

[fol. 127] (11) Judgment of the Court, dated July 22, 1964.

(12) Transcript of the hearing on July 17, 1964 from the fifteenth line on page 31, beginning with "Judge Tuttle", through the 17th line on page 41, said transcript containing all of the evidence presented to the Court at that hearing.

C.

5. The sole question presented by the appeal is the constitutionality of the Civil Rights Act of 1964. The Complaint, the Amendment to the Complaint, the Answer of the defendants, the Stipulation of Facts and the testimony of two witnesses, set forth hereinabove as part of the record, clearly describe the existing controversy and the contentions of the plaintiff. Briefly, the plaintiff contends that the Civil Rights Act of 1964 is unconstitutional because:

(1) Said Act violates the Thirteenth Amendment to the Constitution of the United States, in that, by requiring plaintiff to serve Negroes at plaintiff's motel against plaintiff's will, it subjects plaintiff to involuntary servitude, which is expressly prohibited by the Thirteenth Amendment.

(2) Said Act violates the Fifth Amendment to the Constitution of the United States in that it results in a taking of liberty and property without due process and for public use without just compensation, because it deprives plaintiff of its right to choose its customers and to operate its business as it sees fit, which was the right of the plaintiff possessed prior to the effective date of said Act.

[fol. 128] (3) Said Act exceeds the power to regulate commerce granted to Congress by Article I, Section 8, Clause 3, of the Constitution of the United States.

This 30th day of July, 1964.

Moreton Rolleston, Jr., 1103 Citizens & Southern
Bank Bldg., Atlanta, Georgia 30303, Area 404
523-1566, Attorney for Plaintiff.

[fol. 129] Acknowledgment of Service (omitted in printing).

[fol. 130] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action No. 9017

HEART OF ATLANTA MOTEL, INC., a Georgia
Corporation, Plaintiff,

vs.

THE UNITED STATES OF AMERICA and ROBERT F. KENNEDY, as
the Attorney General of the United States of America,
Defendants.

AMENDMENT TO NOTICE OF APPEAL, AS AMENDED—
Filed July 31, 1964

The Notice of Appeal, as previously amended on July 30, 1964, is further amended by deleting from paragraph A sub-paragraph 3 of the Amended Notice the words "Section 101, sub-section (h)" and substituting therefor "Section 206 (b)".

Moreton Rolleston, Jr., 1103 Citizens & Southern
Bank Bldg., Atlanta 3, Georgia, Jackson 3-1566,
Attorney for Plaintiff.

[fol. 131] Affidavit of Service (omitted in printing).

[fol. 132] Clerk's Certificate to foregoing transcript
(omitted in printing).

INDEX OF SUBJECT MATTER

| | Page |
|---|------|
| JURISDICTIONAL STATEMENT | 1 |
| BRIEF | 11 |
| SUMMARY OF ARGUMENT | 11 |
| ARGUMENT | 16 |
| Law of the Land | 16 |
| Bell v. Maryland | 17 |
| Bell v. Maryland, Concurring Opinion of Mr. Justice Douglas | 17 |
| Bell v. Maryland, Concurring Opinion of Mr. Justice Goldberg | 25 |
| Bell v. Maryland, Dissenting Opinion of Mr. Justice Black | 29 |
| The Legal Question | 32 |
| The Fundamental Issue | 32 |
| Civil Rights Cases | 33 |
| Is There Any Constitutional Basis for the Civil Rights Act of 1964 | 37 |
| The Commerce Clause | 38 |
| People Are Not Commerce | 40 |
| The Function of the Supreme Court in the Federal System | 41 |
| Rebuttal to Arguments of the Government | 44 |
| Current Supporting Authorities | 46 |
| Interstate Commerce by Infection | 49 |
| The Civil Rights Act of 1964 and the Fifth Amend- ment | 51 |

| | Page |
|---|------|
| The Civil Rights Act of 1964 and the Thirteenth Amendment | 54 |
| CONCLUSION | 58 |
| APPENDIX | 1a |

TABLE OF CASES, STATUTES, AND TEXTS

| | |
|--|-----------------------------------|
| Arthur v. Oakes, 63 Fed. 310, 317-18 (7th Cir. 1894) .. | 56 |
| Bailey v. Alabama, 219 U.S. 219, 240-41 (1911) | 55 |
| Bell v. Maryland, 1963 Term, No. 12 | 11, 14, 17, 21, 22, 25, 29, 30 |
| Boylan v. United States, 310 F.2d 493, 498 (9th Cir. 1962) | 52 |
| Browning v. Slenderella Systems of Seattle, 54 Wash. 2d 440, 341 P.2d 859, 868 | 53, 58 |
| Buchanan v. Warley, 245 U.S. 60, 74 (1917) | 53 |
| Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 | 31 |
| Chance v. Lambeth, 4 Cir., 186 F.2d 879 | 48 |
| Civil Rights Cases, 109 U.S. 3... 16, 29, 31, 32, 33, 36, 37, 47 | |
| Corrigan v. Buckley, 271 U.S. 323 (3) (1926) | 55 |
| Ex parte Drayton, 153 Fed. 986, 991 | 55 |
| Flemming v. S. C. Elec. & Gas Co., 4 Cir., 224 F.2d 752 | 48 |
| Heflin v. Sanford, 142 F.2d 798, 799 (5th Cir. 1955) .. | 56 |
| Henderson v. United States, 339 U.S. 816, 70 S.Ct. 843, 94 L.Ed. 1302 | 47 |
| Hodges v. United States, 203 U.S. 1 (1906) | 55 |
| Hornsby v. Allen, et al. | 52 |
| Hotels Employees Local 255 v. Leedom, 358 U.S. 143 | 45 |
| Lieberthal v. North Country Lanes, Inc., 221 F. Supp. 685, 688 (S.D.N.Y. 1963) | 49 |
| Mayor, etc. of the City of New York v. Miln, 9 L.ed., page 136 | 40 |
| Minnesota R. Company v. Beckworth, 129 U.S. 26 ... | 24 |
| Mitchell v. United States, 313 U.S. 80, 61 S.Ct. 873, 85 L.Ed. 1201 | 47 |
| Morgan v. Com. of Virginia, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317 | 48 |
| O'Meara v. Washington State Board Against Discrimination, 365 P.2d 1, 6 Race Rel. L.R. 1109 (1961) | 53 |

| | Page |
|--|---|
| Patterson, et al. v. City of Greenville | 12, 31, 37 |
| Peonage Cases, 123 Fed. 671 | 57 |
| Pollock v. Williams, 322 U.S. 4, 17 (1944) | 55 |
| Robertson v. Baldwin, 165 U.S. 275 (1897) | 57 |
| Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 616-17 (1950) | 52 |
| Shelley v. Kraemer, 334 U.S. 1, 13 (1948) | 12, 30 |
| Slack v. Atlantic White Tower System, Inc., 181 F. Supp. 124 (D.C. Md. 1960), aff'd, 284 F.2d 746 (C.A. 4th, 1960) | 48 |
| Traux v. Aaich, 239 U.S. 33, 41 (1915) | 56 |
| Turner v. City of Memphis, 369 U.S. 350 | 31 |
| United States v. Yellow Cab Company, 332 U.S. 218 .. | 46 |
| Williams v. Carolina Coach Co., D.C. Va., 111 F. Supp. 329, affirmed, 4 Cir., 207 F.2d 408 | 48 |
| Williams v. Howard Johnson's Restaurant, 268 F.2d 845 (C.A. 4th 1959) | 47 |
| Civil Rights Act of 1964 | 2, 8, 9, 11, 12, 13, 15, 18, 20, 21, 22, 24, 29, 30, 33, 37, 38, 40, 41, 45, 50, 51, 52, 54, 58, 59 |
| Civil Rights Act of 1875 | 11, 16, 33, 37, 47 |
| Fourteenth Amendment | 12, 16, 18, 24, 29, 30, 32, 36, 37, 42, 44 |
| Fifth Amendment | 51, 52 |
| Article I, Section 8, Clause 3 (Commerce Clause)... | 39, 47 |
| Georgia Code 52-401 and 52-103 | 20, 21 |
| The Federalist No. 48 | 43 |
| The Federalist No. 51 | 43 |
| The Federalist No. 78 | 43 |
| George Washington Farewell Address | 42 |
| Cornell Law Quarterly, Volume 49, No. 2, Winter, 1964 | 57 |

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No.

HEART OF ATLANTA MOTEL, INC., a Georgia Corporation,
Plaintiff

v.

THE UNITED STATES OF AMERICA AND ROBERT F. KENNEDY
AS THE ATTORNEY GENERAL OF THE UNITED STATES
OF AMERICA

JURISDICTIONAL STATEMENT

A.

This is an appeal from a final judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, granting a permanent injunction. A copy of the opinion of the court and its order are attached hereto.

B.

(1) The complaint in this case was for a declaratory judgment brought pursuant to the provisions of the Declaratory Judgment Act which are set forth in 28 U.S.C.A. Sec. 2201 and Sec. 2202. The complaint also sought a temporary and permanent injunction to prevent the Attorney General from exercising the powers granted

unto him by the Civil Rights Act of 1964, which is an amendment to Section 2004 of the Revised Statute (42 U.S.C. 1971), as amended.

(2) The judgment entered in this case was dated July 22, 1964 and was entered of record on July 23, 1964. The notice of appeal was filed by plaintiff on July 22, 1964 and was amended on July 30 and July 31, 1964, both the notice and amendment being filed in the United States District Court for the Northern District, Atlanta Division.

(3 & 4) Section 206 (b) of the Civil Rights Act of 1964 provides as follows:

"An appeal from the final judgment of such court will lie to the Supreme Court."

We submit that this section of the statute confers jurisdiction upon this Court to hear this appeal and we submit that there is no necessity for citing cases to sustain the jurisdiction.

(5) It is the contention of the appellant that the entire Civil Rights Act of 1964 is unconstitutional because an integral part of that Act, that is, Title II, is unconstitutional. However, Title II of said Civil Rights Act of 1964 is that portion of the Act which is attacked by the complaint filed by the appellant. Title II of said Act reads as follows:

"TITLE II — INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION"

SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among

the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) The provisions of this title shall not apply to a bona fide private club or other establishment not open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

SEC. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

SEC. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

SEC. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice pro-

hibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

(b) In any action commenced pursuant to this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

(c) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

(d) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a): *Provided*, That the court may refer the matter to the Community Relations Service established by title X of this Act for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for

not more than sixty days: *Provided further*, That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

SEC. 205. The Service is authorized to make a full investigation of any complaint referred to it by the court under section 204 (d) and may hold such hearings with respect thereto as may be necessary. The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

SEC. 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge

court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

SEC. 207. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(b) The remedies provided in this title shall be the exclusive means of enforcing the rights hereby created,

but nothing in this title shall preclude any individual or any State or local agency from asserting any right created by any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations; or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right."

C.

The principal legal question involved is whether Title II of the Civil Rights Act of 1964 violates any portion of the Constitution of the United States or the Amendments thereto; and if said Title II be unconstitutional, whether or not the whole Civil Rights Act of 1964 is unconstitutional. Appellant contends that the Constitution and the Fourteenth Amendment contains no prohibition limiting the right of a private individual to choose his customers and that Title II of the Civil Rights Act of 1964 (and the entire Act itself) is unconstitutional because:

1. Said Act exceeds the power to regulate commerce granted to Congress by Article I, Section 8, Clause 3, of the Constitution of the United States.
2. Said Act violates the Fifth Amendment to the Constitution of the United States in that it results in a taking of liberty and property without due process and for public use without just compensation, because it deprives plaintiff of its right to choose its customers and to operate its business as it sees fit, which was the right of the plaintiff possessed prior to the effective date of said Act.
3. Said Act violates the Thirteenth Amendment to the Constitution of the United States, in that, by requiring plaintiff to serve Negroes at plaintiff's motel against plaintiff's will, it subjects plaintiff to involuntary servitude, which is expressly prohibited by the Thirteenth Amendment.

D.

It seems unnecessary to say more than to state simply that the issue raised by this case is of grave importance to every American. The issue of civil rights is ominous but the protection of the rights of all people is even more vital. The outcome of this case will determine whether or not the Constitution was designed to protect minority rights only or whether or not it was designed to protect those minority rights by the greater protection of the rights of all citizens.

In this case, the facts are that appellant's motel refused to rent rooms to a member of the Negro race prior to the enactment of the Civil Rights Act in 1964. Appellant stated in its complaint that it did not intend to serve members of the Negro race (R. 7) and filed suit to prevent the United States and the Attorney General from forcing the motel to accept Negro guests under the Civil Rights Act of 1964. (R. 7) The issues were formed by the admissions in the answer of the United States and of the Attorney General and by the stipulation of facts, which are set forth hereinafter (R. 17):

"One, Plaintiff owns and operates the Heart of Atlanta Motel in Atlanta, Georgia. The motel has 216 rooms for lease or hire for transient guests.

Two, Through various national advertising media, including magazines having national circulation, the plaintiff solicits patronage for the Motel from outside the State of Georgia.

Three, Plaintiff accepts convention trade from outside the State of Georgia.

Four, Approximately 75% of the total number of guests who register at the hotel are from outside the State of Georgia.

Five, Plaintiff maintains over fifty billboards and highway signs advertising the Motel on highways in Georgia."

The answer of the defendants below admitted that the plaintiff corporation operates no other business except the Heart of Atlanta Motel in Atlanta, Georgia, and admitted all other facts alleged (R. 21), except the allegations in the last sentence of paragraph 2 of the complaint and the allegations in paragraph 9 of the complaint that the United States of America had taken for public use part of the rights of the plaintiff in and to its property.

WHEREFORE appellant prays that this Court take jurisdiction of this appeal to the end that this cause may be reviewed and determined by this Court, in accordance with the Constitution of the United States, and as provided for by the statutes of the United States; and for such further relief as to this Court may seem proper.

MORETON ROLLESTON, JR.
Attorney for Appellant

Post Office Address:

1103 Citizens & Southern Bank Bldg.
Atlanta, Georgia 30303

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. .

HEART OF ATLANTA MOTEL, INC., a Georgia Corporation,
Plaintiff

v.

THE UNITED STATES OF AMERICA AND ROBERT F. KENNEDY
AS THE ATTORNEY GENERAL OF THE UNITED STATES
OF AMERICA

BRIEF

SUMMARY OF ARGUMENT

Appellant alleged that Heart of Atlanta Motel had never accepted Negro guests and did not intend to do so, unless ordered by Court. The Civil Rights Act of 1964 commands appellant to accept Negro guests on the same basis as all other guests. The commands of said Act are the same as those in the Civil Rights Act of 1875. The Supreme Court of the United States held that the Civil Rights Act of 1875 was unconstitutional, and that is the law of the land unless this Court sees fit to reverse the previous decision.

The concurring and dissenting opinions of six Judges of this Court in the case of *Bell v. Maryland*, decided June 22, 1964, set forth arguments regarding the validity of a state anti-trespass law. These same arguments are pertinent to the instant case because a state anti-

trespass law gives statutory authority to an individual to exclude Negroes as his business guests, whereas the Civil Rights Act of 1964 establishes statutory prohibition of such choice. The two statutes are diametrically opposed in theory; if one is valid, the other must be invalid. Mr. Justice Black, Mr. Justice White and Mr. Justice Harlan concluded that the Maryland anti-trespass law was not forbidden by the Fourteenth Amendment and was constitutional. We believe this is the proper interpretation and submit that their logic would require that Title II of the Civil Rights Act of 1964 be declared unconstitutional.

We also concur with Mr. Chief Justice Warren's statement in the case of *Patterson, et al. v. City of Greenville* that:

"It cannot be disputed that under our decisions private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."

In the instant case there is no state action of any kind involved. In the case of *Shelly v. Kraemer*, decided in 1948, it was held that the Fourteenth Amendment:

"erects no shield against merely private conduct however discriminatory or wrongful"

and

"... does not of itself, standing alone, in the absence of some cooperative state action or compulsion, forbid property holders, including restaurant owners, to ban people from entering or remaining upon their premises, even if the owners act out of racial prejudice."

Since the Constitution of the United States and the Fourteenth Amendment do not prohibit discrimination by an individual because of race and since Congress derives all of its power from the Constitution, it follows that

Congress had no authority to pass the Civil Rights Act of 1964 in order to prohibit racial discrimination.

If any single part of the Constitution is violated by the Civil Rights Act of 1964, then the Act is unconstitutional. Said Act violates the Fifth Amendment because it results in the taking of property and liberty of an individual without due process and without just compensation. Said Act is also unconstitutional because it forces the appellant to serve a person that it does not wish to serve and, therefore, subjects appellant to involuntary servitude in violation of the Thirteenth Amendment. In a recent decision in the Supreme Court of the State of Washington, there appears this appropriate and judicially accurate holding:

"Discrimination is but another word for free choice. In dealings between men, both cannot be free unless each acts voluntarily; otherwise one is subjected to the other's will."

We must assume that Congress knew of the constitutional objections to the Civil Rights Bill of 1964 when it was under consideration. It is significant that Congress tried to create certain rights for Negroes which did not otherwise exist under the Constitution, by basing said Act upon the commerce clause. Therein lies the great question. The legal problem of the prohibition of racial discrimination is important, but it is merely incidental to the overriding and fundamental issue as to how far Congress can exert its power over individual and personal liberty under the commerce clause. The Government has argued that Congress has simply exercised its full powers under the commerce clause in passing said Act and that the courts have no right to interfere. The other argument is that the Constitution is a "living document" and can be changed from time to time by Congress and the federal courts to meet the modern trends. But that is not what the Constitution says and that is not what the Framers

of the Constitution and those who adopted it intended. The Constitution provides by its own terms the method for amendment. The Framers of the Constitution had just been through a war to win individual liberty from a despotic and centralized government and they meant for the Constitution to protect themselves and their descendants from the evils of tyranny. If the Constitution doesn't mean what it says, and if the Congress or the federal judiciary can change its meaning to make it a "living Constitution", then we don't need the Constitution and it will become a mere scrap of paper if it can be changed by the two branches of the government which the Constitution itself created.

Mr. Justice Goldberg, in the *Bell v. Maryland* case, stated that:

"Our sworn duty to construe the Constitution requires, however, that we read it to effectuate the intent and purpose of the Framers."

We agree. It is the duty of the court not to construe the Constitution in a manner which the court thinks the Framers of the Constitution, if living, would adopt today; this court should construe the Constitution in accordance with the intentions of the Framers at the time it was drawn and in accordance with the intentions of those who adopted it at the time they adopted it. On the subject of discrimination and interstate commerce, their intentions, historically, can easily be ascertained as we have pointed out in the body of the brief.

The genius of the Constitution of the United States was the formation of a federal republic for the first time in history, whose uniqueness and singular strength was found in the balance of powers and the various restrictions placed upon each segment. The powers of the national government were divided among the executive, the legislative and the judicial, with each having certain restrictive

powers over the other. The powers of the national government were specified in the Constitution and the Bill of Rights with the final restriction on the federal government being contained in the Tenth Amendment, which reserved to the states and to the people all powers not specifically granted to the federal government.

The function of the Supreme Court of the United States is to maintain these balances of power within the national government and as between the national government and the states. If the Congress, by an act such as the Civil Rights Act of 1964, can by itself establish itself supreme in any field of legislation by saying that such field has a relationship to interstate commerce, and if this Supreme Court of the United States were to stand idly by and say that it can not interfere with this exercise of power by Congress, then the delicate balance invented and created by the Framers of the Constitution will be destroyed and there will be no further reason for the existence of this Supreme Court in this system of federalism.

Congress has said by Title II of the Civil Rights Act of 1964 that all motels are in interstate commerce and subject to the restrictions against racial discrimination because the people who use motels are part of interstate commerce. What, then, is the limitation beyond which Congress can not go and beyond which Congress can not regulate? Every person and every business affects commerce in some way and, if Congress' power is unlimited under the commerce clause, Congress can regulate every person and every business in any way it sees fit. Under the Civil Rights Act of 1964 Congress has not set up any standards by which to determine if a motel is in interstate commerce or materially affects interstate commerce. Congress could have just as well confiscated all motels, all air lines, all grocery stores and nationalized them on

the theory that they are in interstate commerce or affect interstate commerce. In other words, where does the power of Congress cease under interstate commerce? If Congress has the right to prohibit racial discrimination, it is difficult to see the end to the power of Congress to restrict and prohibit individual freedom and liberty. It is not difficult to see that the final end result is a completely socialistic state where people and individual liberty are of little importance and where the welfare of the federal and national government are of supreme importance.

ARGUMENT

"LAW OF THE LAND"

It is most unusual for any appellant to find himself in any appellate court seeking to uphold a principal of law which, on the one hand, has already been decided by the Supreme Court of the United States and has been the law of the land for 81 years and which, on the other hand, has been the subject of another case in the Supreme Court of the United States within the last 80 days and has been examined and opinioned by six of the present Justices of this Court.

In 1883, 81 years ago, the Supreme Court of the United States held in the *Civil Rights Cases*, 109 U.S. 3, after eliminating all the obiter dicta, that the Civil Rights Act of 1875 was unconstitutional. In the words of the opinion:

"Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments."

The last three amendments referred to were the Thirteenth, Fourteenth and Fifteenth. And then the Court held that the Fourteenth Amendment did not breathe life into the 1875 Act. For several years now, much has been said and written and decided about the "law of the land." The

decision of the Supreme Court in 1883 has been the law of the land on this subject for 81 years and still is.

BELL v. MARYLAND

In the case of *Bell v. Maryland*, 1963 Term, No. 12, decided on June 22, 1964, the present Justices of the Supreme Court of the United States had before them the anti-trespass statute of Maryland. The opinion of the Court, delivered by Mr. Justice Brennan, did not actually decide whether or not a state anti-trespass law was prohibited by the Constitution of the United States; the Court simply remanded the case to the Maryland Court of Appeals. However, in this same case, concurring opinions were written by The Chief Justice, Mr. Justice Douglas and Mr. Justice Goldberg which dealt at length with their views concerning the right to public accommodations by Negroes under the Fourteenth Amendment. Mr. Justice Black, Mr. Justice Harland and Mr. Justice White rendered a dissenting opinion on the same general subject. Therefore, appellant has the unique opportunity of being able to study in advance the reasoning of six of the nine Justices of this Court, which reasoning a party may reasonably expect said Justices to apply in the instant case unless this appellant can demonstrate in this appeal that some of the arguments and reasoning advanced are really illogical. In order to win, a lawyer must be pragmatic; therefore, the following argument regarding *Bell v. Maryland* must be made and it is made with the utmost respect for the Supreme Court of the United States and for each individual Justice thereof.

CONCURRING OPINION OF MR. JUSTICE DOUGLAS IN BELL v. MARYLAND

Counsel for appellant is frankly amazed as to the type of theories advanced to support the concurring opinions of Mr. Justice Douglas in the *Bell v. Maryland* case because they are a radical departure from the time-honored reliance on case precedent, common law and inter-

pretation of statute law in accordance with the intentions of the Legislators. Mr. Justice Douglas based his conclusions that anti-trespass laws are unconstitutional and violate the Fourteenth Amendment because of **"modern trends"**, **"apartheid"**, **"the inventive genius of judges"**, **"the concept of travel in modern times"**, **"the right of mobility"**, **"corporate motivations"** and **"the preservation of the corporate veil"**. Counsel for appellant must be old-fashioned and behind the times if these are legal grounds upon which to determine the constitutionality of a statute. If these arguments were used by a young law student on his bar examination to practice law, counsel submits that he would never be granted a license. However, on the question of such national magnitude as the Civil Rights Act of 1964 and other alleged rights of the Negro, such discussions and arguments as advanced by Mr. Justice Douglas must be pertinent in this Court since they were used by such a distinguished jurist. Therefore, counsel would like to argue the principles laid down by Mr. Justice Douglas in this Court with the apology that such argument, we submit, is necessarily sociological, philosophical and political.

On page 13 of the concurring opinion of Mr. Justice Douglas, in discussing the Maryland anti-trespass law, Mr. Justice Douglas said:

"We would reverse the modern trend were we to hold that property voluntarily serving the public can receive state protection when the owner refused to serve someone solely because they are colored."

Let us hasten to point out that there is no state protection involved in the instant case. But basing the opinion on **"modern trend"** is the point that gives counsel trouble. One can justly ask what is the **"modern trend,"** that is, the thinking of the majority of the people of the United States regarding personal property rights and the erosion of protection of law for those personal property rights

leading to a possible complete subrogation of rights of individuals to centralized government in Washington, D. C. We submit that the "modern trend" today is **fear**; fear as to what the courts of this country will do next to sanction and uphold acts of state and federal governments in the elimination of personal liberty and rights by which individuals have been able to make their own decisions and live their own lives as they wished since the Constitution was adopted in 1787. The "modern trend" is fear of the concentration of power in the federal branches of government to the detriment of state and local government on matters which have traditionally been handled on local levels. The "modern trend" of our people is the fear that, if the federal government can tell a man how to run his own business, how long will it be before the same federal government, using the same theories for the expansion of the commerce power and the use of the Fourteenth Amendment, will extend its power to all businesses and to all phases of all businesses. Worst of all, the "modern trend" is fear that the federal judiciary, which is the last resort of free men for protection, will let down the people of this country and, instead of protecting freedom of the individual, will continue to protect the power of the federal government to interfere with that personal freedom. Counsel urges in all sincerity that if this fear of abandonment by the federal judiciary turns into a loss of faith in the federal judiciary, it would be in catastrophic proportions next only to loss of faith of our people in Almighty God. Reliance on modern trends will never protect the rights of any individuals, be he white or colored, but will only end in chaos. The rule of law, based on established and accepted legal principles, is the cornerstone of freedom.

The concurring opinion relies on the **right to travel** "in modern times" and the **"right of mobility in these times"** (see p. 18, *supra*) and upon the testimony of an official of the National Association for the Advancement of Colored

People (p. 10 of concurring opinion) about the difficulties of a colored man making an auto trip from Virginia to Mississippi, from Indiana to South Carolina and from Florida to Texas. Of course such testimony was not subject to cross-examination by someone who was familiar with the facts and no testimony of the other side of the coin was presented. The witness must have known of the existence of a travel directory, entitled "GO", which is the best and most comprehensive travel guide for Negro tourists. The NAACP official obviously refrained from testifying about the Astor Motel, The Fiesta Motel and the Triple "H" Motel in Jacksonville, Florida or the Miami Carver Hotel and the Hampton House Motel & Villas in Miami or the Sun-Glo Highway Hotel in Orlando, or the Anabel Motel in Pensacola or the Hotel Robert James in St. Petersburg or the Ebony Motel at Riviera Beach and the Abner-Virginia Motel and the Bert Hotel in Tallahassee. The testimony of the NAACP official failed to include information about Nationwide Hotel Association which has more than 60 members. His testimony was totally lacking in the enumeration of the many hotels in the Southeast who had accepted Negroes as well as white guests long before the passage of the Civil Rights Act of 1964.

The "**right of mobility**" referred to in the concurring opinion certainly does not appear in the Bill of Rights to the Constitution and we assume that it is a phrase coined to describe the **common law duty of innkeepers** to accept guests. Of course, it is a well stated principle of law in this country that the common law of England still prevails in this country except where it has been modified by statute. In the State of Georgia, the common law has been so modified under Code Section 52-103 of the Code of Georgia of 1933, as amended, which provides that where establishments which otherwise would be an innkeepers, entertained simply for the accommodation of travelers, they were not innkeepers but depositaries for hire. The facts in the instant case are that practically all of the guests of the Heart

of Atlanta Motel are transient and the **Heart of Atlanta Motel** under Georgia law is a depository for hire and not an innkeeper. Chapter 52-401 of said Georgia Code is a separate section entitled "Tourist Courts" and defines a tourist court as a "motor hotel." The Georgia Code specifies different regulations for governing innkeepers and hotels and operation of innkeepers and the operation of hotels, and prescribes criminal penalties that are applicable to a tourist court or motel but are not applicable to an innkeeper. The origin of an obligation of an innkeeper under common law was founded in the difficulty of that time of travelers in England (all of whom were white) in finding lodging wherever he ended his trip in any given day. The reason therefore was to help all travelers. Applying that theory of common law (even though, under Georgia statute, it does not apply to appellant) to the concept of traffic in modern times as referred to in the concurring opinion, would the Court hold that all 60,000 motels in the United States exist solely for the accommodation of travelers? We think not; yet the *Civil Rights Act of 1964* applies to all 60,000 motels. As the Justices of this Court know, in these modern times, there are many resort motels and hotels who do not cater to people moving from one place to another but rather cater to people who spend two weeks to three months, vacationing and resting in these resorts. There is no logical relation between a resort motel in these modern times, with swimming pools, game courts, golf course privileges, private beaches and other such facilities, with the typical inn existing in England during the development of the common law duty of an innkeeper. The Heart of Atlanta Motel is such a resort motel which caters to vacationers as well as business men. In its advertisements, referred to in the stipulations of fact before the trial court, this motel advertises itself in *Holiday Magazine* as a resort motel.

The concurring opinion calls apartheid a "relic of slavery" and as to the restaurant in the *Bell v. Maryland* case

the opinion stated that "private property is involved, but it is the property that is serving the public". We submit that the great majority of private businesses, operated upon private property, serve the public in that they offer goods or services for the use of or consumption by the public in order to satisfy the needs and wants of the public. In this context, we are not talking about a public utility such as the electric company or telephone company, or a common carrier or any other type of business that has an actual monopoly by virtue of licenses granted by public authorities; we refer to the ordinary business man and merchant who has something to sell to the public. The concurring opinion seems to say that in these times "a man's home or his yard or even his fields" are still sacred and subject to that individual's control. But if the Civil Rights Act of 1964 can tell a proprietor that he must do business with members of the Negro race, one might properly ask how long will a man's home or a man's yard or even his fields will be held inviolate. If a restaurant who uses a substantial portion of food that has moved in interstate commerce is thereby subject to the control of Congress, why aren't the fields of the individual farmer also subject to such control since the farmer buys fertilizer, seed and farm equipment that has moved in interstate commerce and without which he can grow nothing in his fields. If the Congress has the constitutional authority to enact the Civil Rights Act of 1964 to control the operation of motels, hotels, and restaurants because they are "serving the public", then Congress can also regulate, as it sees fit, the operation of department stores, drug stores, hardware stores, beauty parlors, barber shops, automobile agencies, real estate brokers, doctors, lawyers and ad infinitum.

The concurring opinion in the *Bell* case contained these statements:

"The corporation that owns this restaurant did not refuse service to these Negroes because 'it' did not like Negroes.

"The reason 'it' refused service was because 'it' thought 'it' could make more money by running a segregated restaurant."

"The point is that corporate motives in the retail field relate to corporate profits, corporate prestige, and corporate public relations."

"The corporate owners of a restaurant, like the corporate owners of streetcars, buses, telephones, and electric light and gas facilities, are interested in balance sheets and in profit and loss statements."

"A corporation may exclude Negroes if 'it' thinks 'it' can make more money doing so. 'It' may go along with community prejudices when the profit and loss statement will benefit; 'it' is unlikely to go against the current of community prejudice when profits are endangered."

These statements suggest that there is something wrong with a corporation making money. We suggest that the free enterprise system, which has flourished in the United States under the protection of law at least until the passage of the Civil Rights Act, is the great success story of history and has produced a life free from boredom and drudgery, the like of which has never been known. But we refuse to accept the proposition that corporations are motivated by money only and have no other interest in our society. Corporations provide the civic leadership in most communities. Corporations provide the majority of all contributions to most charities including the United Fund Appeal, Boy Scouts, Girl Scouts, YWCA and YMCA. Corporations support the various Chambers of Commerce and provide a large part of the membership in Kiwanis, Rotary and other civic clubs who do a world of good for thousands of unfortunate people. Corporations provide most of the money for the nurture of the fine arts and for the endowment and operation of the great private universities in this country. The motivations of corporations can stand the greatest scrutiny, even from those who do not subscribe to our profit system, but the motivations of corporations should

not be used as a basis for determining the constitutionality of an Act of Congress.

On page fourteen of the concurring opinion there appears this declaration:

"The duty of common carriers to carry all, regardless of race, creed, or color, was in part the product of the inventive genius of judges."

Legal analysis and legal interpretation and constitutional construction should rely on the intelligent genius but not the "inventive genius" of judges. **If the legal basis for the support of the Civil Rights Act of 1964 can not be found in the Constitution of the United States, we respectfully submit that no one has the right to invent a principle in order to sustain the Act.**

And finally, the concurring opinion of Mr. Justice Douglas on page 30, holds that the "**corporate veil**" should not be stripped from a corporate appellant because the appellant could then rely on the personal relationship between a business man and his customer, which the concurring opinion seems to hold should not be subject of control by Congress. This is a grasping for straws. As the final argument, the concurring opinion seems to say that the rights of individual business men should not be accorded to corporate business. This, too, is not in accordance with the ruling in the case of *Minnesota R. Company v. Beckworth*, 129 U.S. 26, in which the Supreme Court of the United States held that **corporations are "persons" within the meaning of the due process clause of the Fourteenth Amendment.**

Counsel agrees with one theory which was referred to in the concurring opinion but to which Mr. Justice Douglas obviously does not subscribe. On page 13, the opinion reads as follows:

"Charles A. Beard had the theory that the Constitution was 'an economic document drawn with superb

skill by men whose property interests were immediately at stake.' An Economic Interpretation of the Constitution of the United States (1939), p. 188. That school of thought would receive new impetus from an affirmance of these judgments. Seldom have modern cases (cf. the ill-starred Dred Scott decision, 19 How. 393) so exalted property in suppression of individual rights."

We submit that property can not be exalted in the suppression of individual rights. **Individual rights and individual liberty are dependent upon the ownership of private property.** They are 'inseparable from private property. The theory of the ownership of private property included, as an inherent ingredient, the freedom of any individual to use that property. Wherever the ownership of private property has disappeared on this earth, whether in Russia, Red China, Cuba, Hungary, Bulgaria or other Russian satellites, human freedom has also largely disappeared. If the incidences of ownership of private property continue to be swept away by either congressional acts or the "inventive genius of judges", individual liberty will slip from our hands.

**CONCURRING OPINION OF MR. JUSTICE GOLDBERG IN
BELL v. MARYLAND**

Another concurring opinion in the case of *Bell v. Maryland* was written by Mr. Justice Goldberg with whom The Chief Justice joined and with whom Mr. Justice Douglas join in part. On page 29 is found the following statement:

"The relationship between the modern innkeeper or restaurateur and the customer is relatively impersonal and evanescent."

and on page 30 is found the following statement:

"Institutions such as these (lunch counters and soda fountains) serve essentially the same needs in modern life as did the innkeeper and the carrier at common law."

As a matter of fact, the average motel in the United States, totaling 60,000 in number, is a 40-50 unit motel owned and operated by a man and his wife who come in very close contact with every guest of the motel. In fact, **the personal contact, the friendliness of the manager and the extra courtesies shown by the manager to the individual guests are the special advantages of this average motel.** The relationship is highly personal and the economic benefits to the average motel are in direct proportion to the cordiality of the innkeeper. This is the concept of the modern innkeeper in modern life. But this is only a fact of economic life and not a legal principle upon which the constitutionality of an act of Congress should be decided.

The second concurring opinion held that "the denial of the constitutional right of Negroes to access to places of public accommodations perpetuates a cast system in the United States." We suggest that there will always be economic stratification in our society and that social stratification will continue to be largely determined by economics. We will always have the common man who does not and will not associate with kings or presidents. Abraham Lincoln is quoted as saying "The Lord must have loved the common man because he made so many of them". **The Constitution of the United States does not guarantee against the classification of people by economic status (cast system, if you must). But the Constitution does guarantee the protection of the ownership of private property and freedom in the use and operation thereof.** The Constitution does guarantee that all people may acquire such private property and such freedom in the use thereof by their energy, industry and effort, properly executed and pursued under law and with good business judgment. In other words, the opportunity to acquire property is guaranteed; but the control of private property is also guaranteed to those who have, by industry and hard work, used their opportunity to acquire such property.

In the concurring opinion of Mr. Justice Goldberg, at page 4, there is a position taken, with which counsel agrees in every respect, to wit:

"Our sworn duty to construe the Constitution requires, however, that we read it to effectuate the intent and purposes of the Framers."

Who were the Framers of the Constitution of the United States? Thomas Jefferson who wrote the Declaration of Independence was not there; neither was John Adams; both were on foreign missions. John Jay was not there. Samuel Adams and George Clinton were not there; not even the man who provided the political catalyst for freedom, namely, Patrick Henry. It was eleven years after the Declaration of Independence that 55 delegates assembled in Philadelphia in 1787 and adopted the Constitution of the United States. Only 39 of these 55 delegates subscribed to the Constitution of the United States by signing it. **Of the 39 delegates the following 15 owned over 400 Negro slaves:**

Butler, Davie, Jenifer, A. Martin, L. Martin, Mason, Mercer, C. C. Pickney, C. Pickney, Randolph, Read, Rutledge, Spaight, George Washington and Wythe.

Historically, Negro slaves were not regarded as persons in 1787 or in 1776 when the Declaration of Independence was proclaimed. **Certainly these Framers of the Constitution did not intend that any of the guarantees or provisions for personal liberties extended to their 400 Negro slaves.**

Of the 55 delegates to the Convention, 40 owned public security interests, as shown by the records of the Treasury Department, for sums varying up to one hundred thousand dollars. Of the delegates 14 members were involved in large land speculation; the speculations of Robert Morris of Pennsylvania ran into millions of acres. This class of delegates included Benjamin Franklin, George Washington and Alexander Hamilton. Twenty-four delegates owned

personalty in the form of money loaned at interest. The following eleven delegates were engaged in large scale mercantile, manufacturing and shipping businesses:

Broom, Clymer, Ellsworth, Fitzsimons, Gerry, King, Langdon, McHenry, Mifflin, G. Morris and R. Morris.

Does anyone seriously think that these 11 wealthy merchants and ship owners ever had their first idea that a member of the Negro race had any right, under the Constitution which they were adopting, either to eat or sleep with these delegates at the taverns and inns existing in those days. And how about John Hancock whose signature on the Declaration of Independence every school child knows. He was the wealthy Boston merchant and the 18th Century radical and extremist who helped dump the tea in the Boston harbor. He and Sam Adams, later President of the United States, were the friends for whom Paul Revere made his nocturne ride to warn. Sam Adams and John Hancock of Massachusetts opposed the Constitution and were known in 1787 as anti-federalists. Can anyone seriously believe that John Hancock, the merchant, ever intended that members of the Negro race would have the right under the Constitution to demand that he serve them?

The presiding delegate in the convention of 1787 was George Washington, of Virginia, who was probably the richest man in the United States in his time. He owned approximately 8,000 acres stretching 10 miles along the Potomac River. Of these 3,500 were under cultivation by Negro slaves. Washington owned Negro slaves who were blacksmiths, carpenters, brick layers; who operated stills and made barrels for his whiskey from home grown oak. George Washington even owned his own schooner in which he shipped flour turned out by his own grist mill. We submit that **George Washington did not intend that the new Constitution would provide any rights of personal freedom for his Negro slaves and certainly not the right to use the taverns and inns in which George Washington slept. While**

Washington was President, he traveled through most of the 13 original colonies and slept in many an inn but never encountered or expected to encounter Negro guests in such taverns or inns. We contend, therefore, that the Framers of the Constitution which were referred to by Mr. Justice Goldberg, did not intend to extend to members of the Negro race those rights which the Civil Rights Act of 1964 attempts to create.

Mr. Justice Goldberg then holds in his concurring opinion that the opinions stated by the courts following the adoption of the Thirteenth and Fourteenth Amendments to the Constitution clearly reflect the contemporary understanding of those times regarding the rights and privileges of the colored race. We concur with this position also and hasten to point out that in the *Civil Rights Cases* the Supreme Court of the United States held in 1883 that the Fourteenth Amendment to the Constitution did not confer upon the members of the Negro race the right to use public accommodations. Although there are quoted in the concurring opinion various statements from the *Civil Rights Cases*, the opinion ignores the ruling of the Court that the Fourteenth Amendment did not confer such rights upon Negroes. We submit that the Judges in 1883 were much more familiar with the feelings and intentions of those who supported the Fourteenth Amendment and that the legal interpretation of 1883 was and is correct.

DISSENTING OPINION OF MR. JUSTICE BLACK IN BELL v. MARYLAND

In the *Bell v. Maryland* case, there was a dissenting opinion rendered by Mr. Justice Black with which Mr. Justice Harlan and Mr. Justice White joined:

“The crucial issue which the case does present but which the Court does not decide is whether the Fourteenth Amendment, of itself, forbids a State to enforce its trespass laws to convict a person who comes into a privately owned restaurant, is told that because of

his color he will not be served, and over the owner's protest refuses to leave. We dissent from the Court's refusal to decide that question. For reasons stated, we think that the question should be decided and that the Fourteenth Amendment does not forbid this application of a State's trespass laws."

In the *Bell* case, the Court simply remanded the question to the Maryland State Court for further decision and, Mr. Justice Black's opinion dissented from that act of remanding the case on the grounds that the constitutionality of the Maryland anti-trespass laws should be decided, by holding that the Maryland anti-trespass law was not forbidden by the Fourteenth Amendment.

The theory of the Maryland anti-trespass law is diametrically opposed to the theory of the Civil Rights Act of 1964. The anti-trespass law permits a man to select his business guests and to refuse to serve anyone because of his color. The Civil Rights Act denies a man his right to select his guests or to refuse to serve a customer because of his color. If the anti-trespass law does not violate the Constitution of the United States and is not prohibited by the Fourteenth Amendment, then the Civil Rights Act of 1964 must, by all logic, violate the provisions of the Constitution of the United States, including the Fourteenth Amendment. Congress can not prohibit personal acts of individuals which are not prohibited by the Constitution, because Congress' power emanates from the Constitution.

The dissenting opinion goes on to say (page 9) that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful, *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). This well-established interpretation of Section 1 of the Amendment—which all the parties here, including the petitioners and the Solicitor General, accept—means that this section of the Amendment does not of itself, standing alone, in the absence of some cooperative state action or compulsion,

forbid property holders, including restaurant owners, to ban people from entering or remaining upon their premises, even if the owners act out of racial prejudice."

In the instant case, there are no allegations and no evidences of any State action of any kind supporting the individual and private choice of the appellant to refuse service to Negroes.

Before giving further consideration to the *Civil Rights Cases*, counsel would like to point out that in the case of *Patterson, et al. v. City of Greenville*, 373 U.S. 244, Chief Justice Warren said on page 247:

"It cannot be disputed that under our decisions 'private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it.' *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722; *Turner v. City of Memphis*, 369 U.S. 350."

and at page 250 Mr. Justice Harlan said:

"Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from government interference. This liberty would be overridden, in the name of equality, if the strictures of Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority."

May we point out again, in connection with the *Patterson* case, that there is no State action involved in the instant case.

THE LEGAL QUESTION

The constitutionality of the Civil Rights Act of 1964 is the legal issue raised by the complaint in the instant case. It is also true that Title II, known as the Public Accommodations Section, is that portion of the Civil Rights Act of 1964 under which the instant case arises. It is our contention that the entire Act is unconstitutional because Title II of the Act is unconstitutional, and the whole Act must fall in its entirety. However, the argument of this brief pertains only to the validity of Title II of the Civil Rights Act of 1964 and appellant will leave to the Court, without argument, the effect upon the entire Civil Rights Act of 1964 of the invalidity of Title II of said Act.

THE FUNDAMENTAL ISSUE

The fundamental issue, however, in the instant case is not whether or not Congress has the right under the Constitution to create new rights for the members of the Negro race, as we contend Congress attempted to do, nor whether or not the Constitution of the United States guarantees such rights to such Negro citizens as contended by the government. The fundamental question is whether or not Congress has the power to take away the personal liberty of an individual to run his business as he sees fit with respect to the selection and service of his customers. This is the important issue and the fact that alleged civil rights of Negroes are involved is purely incidental because if the Congress can exercise these controls over the rights of individuals, it is plausible there is no limit to Congress' power to appropriate and destroy individual liberty and property.

The holding of the Supreme Court in the *Civil Rights Cases* was made known to the members of Congress during the arguments over the Civil Rights Act of 1964. They were advised that it had been held that the Fourteenth Amendment did not authorize such an Act. So in order to accomplish the end desired to establish certain rights under said Act for Negroes, said Act relies upon the Com-

merce Clause of the Constitution. **There is no relationship between the purposes of the Act and the means adopted to achieve the end.** The Act seeks to extend the power of Congress to regulate interstate commerce by declaring that all motels are part of interstate commerce. We submit that all motels are not part of interstate commerce and do not affect interstate commerce. We now wish to point out what the *Civil Rights Cases* held, what the Court said or did not say regarding interstate commerce and the historical background of the Commerce Clause in the Constitution.

CIVIL RIGHTS CASES

The Congress of 1875 passed the Civil Rights Act which contained two sections. Section I is quoted hereinafter to show that it is almost identical with the substantive law of Title II of the Civil Rights Act of 1964:

"That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theaters and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

Section II of the 1875 Act differs with the 1964 Act only in that penal sections were much more severe.

The U. S. Supreme Court held in 1883 in said Civil Rights Cases as follows:

"Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three Amendments."

"It (14th Amendment) does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action, of the

kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the Amendment."

"The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give the Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts."

"Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of State Legislatures and to supersede them."

"If this legislation is appropriate for enforcing the prohibitions of the Amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty and property?"

"The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the 10th Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

"In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution

against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual, an invasion of the rights of the injured party; it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the State, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. Any individual cannot deprive a man of his right to vote, hold property, to buy and to sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all of those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration."

"The law in question, without any reference to adverse state legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances and places of public amusement, and imposes a penalty upon any

individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances and places of amusement. It supersedes and displaces state legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation."

It is of passing interest also to note who these justices were. Plainly they had no Southern bias. Bradley, who wrote the opinion, was 70 years old in 1883, a native of New York, a Rutgers graduate, an ardent Unionist who publicly had denounced secession as treason. Samuel Blatchford, 63, also was a New Yorker, a Columbia graduate, formerly private secretary and later law partner of William H. Seward. The colorful Stephen J. Field, 66, a native of Connecticut, had been appointed from California. Horace Grey, 55, was a Bostonian, a Harvard graduate, a renowned scholar and jurist who had served many years on the Supreme Judicial Court of Massachusetts. Stanley Matthews, 59, was a native of Cincinnati, formerly the editor of an abolitionist newspaper, who had served as a colonel of Ohio infantry in the Union army. William Burnham Woods, 59, also an Ohioan, served as a Union officer at Shiloh, in the siege of Vicksburg, and Sherman's march to the sea. Samuel F. Miller, 67, started out to be a doctor in Kentucky, practiced medicine for 12 years, took up the law, and moved to Iowa where his emancipationist views were more acceptable. Chief Justice Morrison R. Waite, 66 was a native of Connecticut, a Yale graduate, a staunch Unionist who settled in Toledo and identified himself prominently with the Northern cause.

As to the reference of the Commerce Clause in the *Civil Rights Cases*, it is important to point out that the Court held that nothing was contained in the Constitution, before the adoption of the Thirteenth, Fourteenth and

Fifteenth Amendments, which could sustain the Civil Rights Acts of 1875 and in making that decision, the Court was, of course, aware of the existence of the Commerce Clause in the Constitution at that time.

Referring again to the dissenting opinion of Mr. Justice Black, it was pointed out that nothing cited in the concurring opinion of Mr. Justice Goldberg supported the proposition that the Fourteenth Amendment standing alone "prohibits owners of restaurants and other places to refuse service to Negroes". Mr. Justice Black further stated:

"And it is revealing that in not one of the passages cited from the debates on the Fourteenth Amendment did any speaker suggest that the Amendment was designed, of itself, to assure all races equal treatment at inns and other privately owned establishments."

Mr. Justice Black continued:

"We express no views as to the power of Congress, acting under one or another provision of the Constitution, to prevent racial discrimination in the operation of privately owned businesses, nor upon any particular form of legislation to that end."

IS THERE ANY CONSTITUTIONAL BASIS FOR THE CIVIL RIGHTS ACT OF 1964?

This now leads us inevitably to the question of whether or not Congress has the authority, under any other section of the Constitution, to pass such legislation as the Civil Rights Act of 1964. The Supreme Court of the United States in the *Civil Rights Cases* has held that the Fourteenth Amendment did not authorize legislation such as the Civil Rights Act of 1964. Mr. Justice Black, Mr. Justice White and Mr. Justice Harlan have indicated that they do not believe the Fourteenth Amendment authorizes such legislation. The Chief Justice has stated in the *Patterson* case, cited above, that such legislation is not authorized by the Equal Protection Clause". So, again, the question is

whether or not some other part of the Constitution supplies basis for the Civil Rights Act of 1964.

Mr. Justice Black in his dissenting opinion, we submit, put his finger on the whole issue in the following sentence:

“Precisely put, our position is that the Constitution of itself does not prohibit discrimination by those who sell goods and service.”

If the Constitution does not prohibit such discrimination, then the Congress has no power to enact such legislation against discrimination because all of the powers of Congress are derived from the Constitution and all other powers and rights under the Tenth Amendment are reserved to States respectively, or to the people.

THE COMMERCE CLAUSE

We now turn to the question of the awesome and fearful and consuming “commerce clause”. We have stated before that we agree with Mr. Justice Goldberg’s opinion that the Court should abide by the intents and purposes of the Framers of the Constitution. **A historical flash-back**, to use a modern term, will reveal that the Constitution adopted in 1787 arose out of the weakness of the Confederation which was our form of national government from its adoption in 1781 until the Constitution was ratified by the first nine states. The Confederation relied upon the good will of member states. It became so financially bankrupt that the Constitutional Convention in 1787 did not have enough money to pay a chaplain to open and close the meetings. By 1783, Robert Morris, the able finance minister of the Confederation, resigned in despair and said:

“It can no longer be a doubt . . . that our public credit is gone.”

By 1786 the country was in a severe economic depression. Continental securities were considered almost worthless. All attempts to give the Confederation limited taxing power

by amendment had failed. **Then interstate brawls began to take place.** In 1787 the State of New York increased custom duties on foreign merchandise and assessed heavy entrance and clearance fees on all vessels coming from or bound to New Jersey and Connecticut. New Jersey retaliated by taxing the lighthouse on Sandy Hook 30 pounds a month! The state of Virginia and the state of Maryland had long been fighting over Maryland's jurisdiction over the Potomac up to the Virginia shore. Pennsylvania and Delaware were also concerned because some of their commerce had to pass through Virginia's territorial waters. These conflicts between states regarding trade between states prompted Virginia's Assembly to call a **convention at Annapolis "to take into consideration the trade of the United States"**.

The Annapolis Convention met in 1786 but there were only five states represented. Alexander Hamilton and James Madison persuaded the convention to call another convention in which all the states would be represented and Hamilton delivered a report proposing the Constitutional Convention:

"to devise further provision as shall appear . . . necessary to render the Constitution of the federal government adequate to the exigences of the Union".

That was the genesis of the federal government of 1787. The economy of the country was at a low ebb; trade between the states (interstate commerce, by another name) was greatly impeded and the preservation of the economic stability of the new United States was the principal concern.

Article I, Section 8, clause 3 of the Constitution, adopted at that convention in 1787 simply provides that Congress shall have the power:

"to regulate commerce with foreign nations, and among the several states and with Indian Tribes."

PEOPLE ARE NOT COMMERCE

The commerce referred to by the Framers of the Constitution was the exchange of goods between states, the sale and delivery of products of agriculture and industry, the prices and tariffs of such trade, and the transportation of such goods between the states. The Framers of the Constitution were faced with no problem concerning the mobility of citizens because of restrictions applied to individuals. The barriers that impeded commerce at that time between the states were economic barriers that prevented the free flow of goods and not of people. **Persons and people are not a part of trade or commerce.** Persons and people are not the objects, the means or the end of trade or commerce. People conduct commerce and engage in trade, but people are not part of commerce and trade. In the case of *The Mayor, etc. of the City of New York v. Miln*, 9 L. ed., page 136, the court held that "they (persons) are not the subject of commerce", said case involving a New York state statute requiring reports of certain information regarding people entering the port of New York by ship. Even today, in the new Uniform Commercial Codes, which are being adopted by state after state, the subject matter includes sales, warehousing, titles, transportation, finance, security and enforcement of property rights—but nothing about people and personal liberties and nothing about alleged civil rights. No one knew better than Alexander Hamilton that the proposed noble and abstract principles of government would have never succeeded unless that government was supported by the financiers, bankers, merchants, manufacturers, and holders of the public debt.

In adopting the Civil Rights Act of 1964 Congress has simply said that commerce between the states includes the movement of people, and that since people use motels for sleeping purposes, all motels are therefore engaged in interstate commerce. But passing a law and stating that green is red does not necessarily make green red. The Civil

Rights Act of 1964 can find no source of authority in the Constitution. If the wants and desires of the Negro race, currently referred to as civil rights, can be forced upon other people, whose wants and desires are in direct conflict, by the mental gymnastics that all such desires are subject to the regulations of Congress because all people are part of interstate commerce, then there is no logical or foreseeable end to the extension of the power of Congress under the commerce clause. There will be no area left for the exclusive jurisdiction of state legislatures because the Congress can appropriate any field of law, since all areas of the law and all principles of law affect those same people that Congress would like to say are part of interstate commerce. Such an unwarranted extension of the power of Congress, based on an unlimited interpretation of the Commerce Clause would in effect destroy our Republican and Federal form of government. There can be no question but that the Civil Rights Act of 1964, if upheld, will be the straw that broke the camel's back. If such Act is upheld, the flood gates of federal power will be wide open and no one will ever again legally and peaceably be able to resist the onslaught of federal control by congressional legislation.

THE FUNCTION OF THE SUPREME COURT IN THE FEDERAL SYSTEM

Not only did the Constitution of the United States provide in the Tenth Amendment specifically that the federal government was one of limited powers set forth in the Constitution itself, as Mr. Justice Black has pointed out, but it was adopted by states with provisions included which were designed to carry out the intentions of the Framers to maintain local governments by the various states themselves. If the action of these states now can be pre-empted by federal legislation under the commerce clause, then our concept of the federal structure is destroyed and the delicate balance between the national and state government can no longer be maintained. **This Supreme Court of the**

United States has as its chief function the maintenance of the delicate balance between national and state governments by its very power to declare acts of either to be unconstitutional. If the state governments lose their autonomy and lose their right of legislation upon local affairs, then the reason for the existence of this Supreme Court no longer exists and this Court shall become superfluous. It is needless to point out that there are no organizations similar to the Supreme Court existing in the Soviet Union, where totalitarian democracy triumphs, at the cost of representative government.

If the Fourteenth Amendment does not authorize the Civil Rights Act of 1964 and if the Constitution offers no legal basis for such congressional action, then this Act is a gross taking of the freedom and private rights of individuals. None other than George Washington, in his farewell address on September 17, 1796 warned against such usurpation as follows:

"It is important, likewise, that the habits of thinking in a free country should inspire caution in those intrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism . . . If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this is one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly over-balance in permanent evil any partial or transient benefit which the use can at any time yield."

The most authoritative treatise about the Constitution is the group of writings called *The Federalist* which were

written by Hamilton, Madison and Jay. They give a complete, adequate and accurate presentation of the views of the Framers of the Constitution. Madison in *The Federalist*, No. 48, said:

"The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. The founders of our republic . . . seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority."

The Federalist posed the question of how the legislative body, who could court the favor of strong interests and organized groups of the public by unjust legislation, could be curbed by the Constitution itself and Madison proposed, in *The Federalist*, No. 51, that:

". . . the defect must be supplied by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places . . . It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."

On the subject of judicial control over legislation under the Constitution, Hamilton enumerated the advantages to be derived out of it in *The Federalist*, No. 78, which reads in part as follows:

"In a monarchy it (judicial control) is an excellent barrier to the despotism of the prince; in a republic it is no less an excellent barrier to the encroachments and oppressions of the representative body. . . . If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachment, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to the

independent spirit in the judges which must be essential to the faithful performance of so arduous a duty . . . But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of private rights of particular classes of citizens, by unjust and partial laws. Here also the affirmnness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon a character of our governments than but few may be aware of."

REBUTTAL TO ARGUMENTS OF THE GOVERNMENT

The theory advanced in the trial Court by the Government, both orally and in brief, was that Congress in passing the Civil Rights Act of 1964 was simply exercising its full power under the commerce clause. **If that is the theory of our government now, then Congress can do no wrong and can legislate on any and all matters affecting people on the grounds that they are part of interstate commerce.** The next act of Congress would include the corner drug store, the hardware store, and the grocery store. Then the next act of Congress would include churches and private clubs and fraternal organizations, masonic, social or otherwise. Then the next act of Congress, in the exercise of its full power under the commerce clause, could include your home—and then we shall have arrived at the full and complete socialistic state that the Framers of the Constitution despised, dreaded and detested. The government cited, and we are sure will

cite in their brief to this Court, many, many cases which show the gradual erosion which has already taken place concerning private rights, personal freedom and the inalienable right of any individual to use his personal property and to run his business as he sees fit. The government points out the decisions which have upheld the anti-trust laws affecting businesses engaged in interstate commerce or which materially affect interstate commerce. At least, these decisions applied the anti-trust acts on the basis of involvement in trade between the states or in such acts that affected "materially" trade flowing from one state to another. The government also relies on the many decisions regarding wage and hour legislation which find their roots in the commerce clause. But at least, wage and hour laws pertain only to certain businesses that meet such requirements as set out in the laws, such as a minimum volume business of so many hundreds of thousands of dollars. Whereas, the Civil Rights Act of 1964 says that all motels are part of interstate commerce without meeting any specified standards to so classify them. The government also relies on many cases upholding decisions of the National Labor Relation Board as an agency of Congress deriving its power to regulate from the alleged power of the commerce clause. Again, at least the National Labor Relation Board does not assert jurisdictions over all businesses; whereas the Civil Rights Act of 1964 covers all motels. In 1958 in the case of *Hotels Employees Local 255 v. Leedom*, 358 U.S. 143, this Court first held that the National Labor Relations Board could not refuse to take jurisdiction over labor disputes in hotels and motels "as a class"; but the application of the N.L.R.B. jurisdiction has been applied only where the particular hotel affected interstate commerce.

CURRENT SUPPORTING AUTHORITIES

Fortunately, there is no unanimity among lawyers and legislators and courts as to the unlimited power of Congress to control all people, about any subject which Congress selects. In the case of *U. S. v. Yellow Cab Company*, 332 U.S. 218, there was involved the transportation by **taxi cabs** of people from railroad stations in Chicago to their homes, offices and hotels, and vice versa. The question before the court was whether or not such transportation was part of interstate commerce. The court held as follows:

"We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation."

"In short, their relationship to interstate transit is only casual and incidental."

"But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business."

"We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations."

"Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination."

If the transportation by taxi cabs of out-of-state residents or travelers from a railroad station or an airport to a motel is not part of interstate commerce, then how can anyone logically urge that the hotel or motel to which he is transported is involved in interstate commerce?

In *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845 (C.A. 4th 1959), a Negro attorney in the Internal Revenue Department brought suit in federal court against a **Howard Johnson restaurant** located on an interstate highway, based upon the restaurant's refusing him service because of his race. Reliance was placed on the Civil Rights Act of 1875 and the Commerce Clause. The Court of Appeals rejected both contentions, pointing out that the 1875 Act had been held unconstitutional in the *Civil Rights Cases*, and as to the Commerce Clause argument, it was said:

"The plaintiff makes the additional contention based on the allegations that the defendant restaurant is engaged in interstate commerce because it is located beside an interstate highway and serves interstate travelers. He suggests that a Federal policy has been developed in numerous decisions which required the elimination of racial restrictions on transportation in interstate commerce and the admission of Negroes to railroad cars, sleeping cars and dining cars without discrimination as to color; and he argues that the commerce clause of the Constitution (Article I, Section 8, Clause 3), which empowers Congress to regulate commerce among the states is self-executing so that even without a prohibitory statute no person engaged in interstate commerce may place undue restrictions upon it."

"The cases upon which the plaintiff relies in each instance disclosed discriminatory action against persons of the colored race by carriers engaged in the transportation of passengers in interstate commerce. In some instances the carrier's action was taken in accordance with its own regulations, which were declared illegal as a violation of paragraph 1, section 3 of the Interstate Commerce Act, 49 U.S.C.A. § 3 (1), which forbids a carrier to subject any person to undue or unreasonable prejudice or advantage in any respect, as in *Mitchell v. United States*, 313 U.S. 80, 61 S. Ct. 873, 85 L. Ed. 1201, and *Henderson v. United States*, 339 U.S. 816, 70 S. Ct. 843, 94 L. Ed. 1302. In other instances, the carrier's action was taken in

accordance with a state statute or state custom requiring the segregation of the races by public carriers and was declared unlawful as creating an undue burden on interstate commerce in violation of the commerce clause of the Constitution, as in *Morgan v. Com. of Virginia*, 328 U.S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317; *Williams v. Carolina Coach Co.*, D.C. Va., 111 F. Supp. 329, affirmed 4 Cir. 207 F. 2d 408; *Flemming v. S. C. Elec. & Gas Co.*, 4 Cir., 224 F. 2d 752; and *Chance v. Lambeth*, 4 Cir., 186 F. 2d 879."

"In every instance the conduct condemned was that of an organization directly engaged in interstate commerce and the line of authority would be persuasive in the determination of the present controversy if it could be said that the defendant restaurant was so engaged. We think, however, that the cases cited are not applicable because we do not find that a restaurant is engaged in interstate commerce merely because in the course of its business of furnishing accommodations to the general public it serves persons who are traveling from state to state. As an instrument of local commerce, the restaurant is not subject to the constitutional and statutory provisions discussed above, and thus, is at liberty to deal with such persons as it may select. Our conclusion is, therefore, that the judgment of the District Court must be affirmed." (268 Fed. 2d 845).

"This principle was later restated and applied in the case of *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124 (D.C. Md. 1960), aff'd, 284 F. 2d 746 (C.A. 4th 1960)."

If a restaurant is not engaged in interstate commerce merely because it furnishes accommodations to people traveling from state to state, by what logic can a motel be held to be in interstate commerce because it furnishes accommodations to people who are traveling from state to state?

It has also been held with respect to the bowling alley business that local business activities cannot be reached or regulated by the federal government under its power

to regulate interstate commerce even though the business drew trade from, advertised in and received equipment from other states. See *Lieberthal v. North Country Lanes, Inc.*, 221 F. Supp. 685, 688 (S.D.N.Y. 1963). In the words of the district court:

" . . . incidental flow of supplies in interstate commerce to the local enterprise, or *travel in interstate commerce of customers of the local enterprise*, or soliciting business in other states for the local enterprise did not make the local enterprise a part of interstate commerce under the Sherman Anti-Trust Act." (Emphasis added.)

INTERSTATE COMMERCE BY INFECTION

We would like to anticipate the theory upon which the government will also rely to sustain this act under the Commerce Clause, that is, that since Heart of Atlanta Motel serves interstate travelers and since the Heart of Atlanta Motel buys supplies that come from states outside of Georgia and since Heart of Atlanta Motel seeks guests from out of state by means of advertising by media which go outside the state of Georgia, therefore Heart of Atlanta Motel is engaged in interstate commerce. This is nothing more than a theory of "**interstate commerce by infection**". For example, suppose an out-of-state traveler comes to Atlanta, Georgia by airplane. He first goes by taxi cab to the First National Bank of Atlanta to arrange for a construction loan for his business. He then goes to a local real estate firm to sign a contract for the purchase of land in Atlanta. He then goes to a purely local contractor and signs a construction contract for a new building. He has lunch at the Commerce Club (luncheon club), dinner at the Piedmont Driving Club (social club), is entertained at Wits End (night club), and finally goes to Heart of Atlanta Motel and rents a room for the evening. The question is: Does that interstate traveler infect all of those businesses with interstate commerce and subject all of those businesses completely


to the control of Congress under the Commerce Clause? We suggest that the interstate commerce of this hypothetical traveler terminated when he arrived at the Atlanta airport; that his activities in Atlanta were of a purely local nature involving local transactions; and that he simply came to the Heart of Atlanta Motel to rest. We submit that any other traveler coming to plaintiff's motel ceases to be in the stream of interstate commerce, whether he makes other stops in Atlanta or in Georgia first or whether he comes directly to the motel, because it is his intention to end his trip.

If every local grocery store who buys oranges from Florida, if every lawyer who buys pencils from Pennsylvania, if every doctor who buys instruments from Connecticut can be said to be in interstate commerce because they purchase something that they use in their business which comes from outside of Georgia, then the commerce clause has been stretched to include all phases of business and Congress can appropriate any field of legislation and exclude from such area of law all actions by all local governments.

If the theory of "interstate commerce by infection" prevails and if the interstate commerce clause can be stretched to include any business or person who buys something from outside the state, then we as a people have lost all rights of self-government in the attempt of Congress to force one man to accept another by the passage of the Civil Rights Act of 1964, which is based on the interstate commerce clause.

The "modern trend" of affairs referred to by Mr. Justice Douglas and so brilliantly illuminated by the cases cited by the Government should give any thoughtful American pause to wonder whether it is not now too late to heed the trenchant remarks of Woodrow Wilson that:

"The history of the development of freedom is the history of the limitation of the power of the government and not the growth thereof."



THE CIVIL RIGHTS ACT OF 1964 AND THE FIFTH AMENDMENT

Not only does the Fourteenth Amendment not authorize the Civil Rights Act of 1964, not only does the Constitution of the United States not prohibit discrimination by individuals which is prohibited by said Act, and not only does the commerce clause not authorize said Act, but the Constitution itself expressly prohibits the inevitable and inherent consequences of said Act, namely (1) the taking of liberty and property without due process and the taking of private property for public use without just compensation, in violation of the Fifth Amendment to the Constitution and (2) the forcing of involuntary servitude upon literally thousands of people, in violation of the Thirteenth Amendment to the Constitution.

The Fifth Amendment reads in part as follows:

“ . . . nor (shall any person) be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

It has long been settled that the taking of any right of ownership of private property is the taking of property under the law. These questions have been settled by many cases involving condemnations and the right to eminent domain. **The right to use one's property as that owner sees fit is a property right and the taking of that right is a taking of property.** This right of ownership to use one's property as one sees fit is a fundamental principle underlying the private enterprise system created and nurtured under the laws of the United States over a long period of history.

Is there a taking of liberty by virtue of the prohibition of the Civil Rights Act of 1964? Liberty is the free exercise of the will of man, subject only to the restrictions for the public good and the concern of all men, not just one class of man. The prohibition of said Act interferes

with the liberty of the plaintiff to choose its customers for whatever reason, which was the liberty that plaintiff had before the passage of the Civil Rights Act of 1964 and which is now prohibited thereby.

Was the taking of this property right and this liberty without due process? If the taking is not authorized by a constitutional statute then the taking is without due process. Certainly the procedural due process has not been observed.

The U. S. Court of Appeals of the Fifth Circuit, in January 1964 in the case of *Hornsby v. Allen, et al.*, defined due process at length. The Court held that there must be a responsible finding, after a hearing with adequate notice, at which hearing the parties would have the opportunity to be present and to present evidence and to cross-examine witnesses; and that the findings must conform to the evidence adduced at the hearing. We submit that there has been a taking of the property rights and the liberty described herein and in the plaintiff's Complaint, without any hearing or responsible findings. Congress simply decided that they would take the property and liberty of the plaintiff and others similarly situated.

The Fifth Amendment further provides for just compensation for the taking of private property for public use. Certainly no compensation is provided in the Civil Rights Act of 1964 or in any other act of Congress for the taking complained of. We contend that the taking of private property has been for the purpose of devoting it to public use, that is, for the use of all people without restriction. We contend that such use without restriction is public use.

There can be no questioning of the fact that the power of Congress to regulate interstate commerce is subject to the limitations embraced by the "due process" clause. *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 616-17 (1950); *Boylan v. United States*, 310 F. 2d

493, 498 (9th Cir. 1962). It is also beyond dispute that the constitutional guarantee against the taking of property without due process of law embraces everything over which a man may have exclusive control or dominion and all character of vested rights. *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

In a recent Washington case, *O'Meara v. Washington State Board Against Discrimination*, 365 P. 2d 1, 6 Race Rel. L.R. 1109 (1961), a Washington statute banning discrimination in the sale of housing accommodations financed through public assistance was declared unconstitutional. A concurring judge declared:

"This constitutional right of the individual not to be dominated in his private affairs is predicated upon the theory that the greatest good for the greatest number can be best achieved by permitting the individual to choose his own course of action, conforming, of course, to the reciprocal rights of others.

"* * * In dealings between men, both cannot be free unless each acts voluntarily, otherwise one is subjected to the other's will." *Browning v. Slenderella Systems of Seattle*, 54 Wash. 2d 440, 341 P. 2d 859, 868.

"Until our constitution is amended, we must forego the benefits of regimentation with which other parts of the world are blest.

"Thus, a white man may exercise his constitutional right to choose his own course of action in his private affairs by making a voluntary sale of his home in an exclusive district to a Negro. Neighbors cannot disturb him in his private affairs by having him enjoined from doing so. So also, if a white man refuses to sell his home to a Negro, his constitutional right not to be disturbed in his private affairs shields him from coercion on the part of the Negro."

(6 Race Rel. L.R. 1116).

In a prior case, *Browning v. Slenderella Systems of Seattle*, 54 Wash. 2d 440, 341 P. 2d 859, 4 Race Rel. L.R.

701 (1959), the Washington Supreme Court had considered a case involving an award of damages to a Negro woman under the Washington Public Accommodations Statute for refusal to serve her in a beauty salon. While the question as to the constitutionality of this law was not before the Court, a dissenting judge stated the proposition so clearly that I hasten to repeat it here, viz.:

"All persons familiar with the rights of English speaking peoples know that there liberty inheres in the scope of the individual's right to make uncoerced choices as to what he will think and say; to what religion he will adhere; what occupation he will choose; where, when, how and for whom he will work, and generally to be free to make his own decisions and choose his courses of action in his private civil affairs. The constitutional rights of lawabiding citizens are the very essence of American Liberties."

The plaintiff has alleged in its Complaint, as amended, that the freedom of contract is guaranteed by the Fifth Amendment. This is an often stated principle, but it is simply another way of saying that a man who owns a business, which is purely local in nature, has the right to pick and choose his customers as he sees fit and without any restrictions by the federal government.

CIVIL RIGHTS ACT OF 1964 AND THIRTEENTH AMENDMENT

The Civil Rights Act of 1964 is unconstitutional because it violates the Thirteenth Amendment to the Constitution of the United States. The long established policy and practice of Heart of Atlanta Motel has been to refuse to rent accommodations to any Negroes (R. 7). As alleged in plaintiff's Complaint, this policy was adopted and pursued as in the best interest of plaintiff's business and as necessary to protect plaintiff's property, trade, profits and reputation (R. 8). In other words plaintiff chose, and now chooses not to serve Negroes. The Civil Rights

Act of 1964 demands that plaintiff serve Negroes. This, we contend, subjects plaintiff to involuntary servitude.

Almost fifty years ago the Supreme Court of the United States, in *Hodges v. United States*, 203 U.S. 1 (1906), declared:

"Slavery and involuntary servitude as denounced by the Thirteenth Amendment means a condition of enforcement of compulsory service of one to another; and while the cause inciting that amendment was the emancipation of the colored race, it reaches every race and every individual."

It was the purpose of the Thirteenth Amendment not only to end slavery, but to maintain a system of completely free and voluntary labor throughout the United States. *Pollock v. Williams*, 322 U.S. 4, 17 (1944); see also *Corrigan v. Buckley*, 271 U.S. 323 (3) (1926).

In the case of *Ex parte Drayton*, 153 Fed. 986, 991, the Court observed that:

"to compel one person to labor for another against his will is legalized thralldom."

In the case of *Bailey v. Alabama*, 219, 240-41 (1911), the Court held as follows:

"The language of the Thirteenth Amendment was not new. It reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory and gave them unrestricted application within the United States and all places subject to their jurisdiction. While the immediate concern was the African slavery, the Amendment was not limited to that. It was a charter of universal freedom for all persons, of whatever race, color or estate, under the flag . . .

"The plain intention was . . . to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude."

The U. S. Court of Appeals in Chicago in the case of *Arthur v. Oakes*, 63 Fed. 310, pp. 317-18 (7th Cir. 1894), held:

"It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude."

Nor does the fact that the person, compelled to render services or to perform labor for another, receives payment affect the nature of such services or labor as being involuntary servitude. As stated by the Fifth Circuit in *Heflin v. Sanford*, 142 F. 2d 798, 799 (5th Cir. 1944):

"Whether appellant was paid much, or little or nothing, is not the question. It is not uncompensated service, but involuntary servitude which is prohibited by the Thirteenth Amendment. Compensation for service may cause consent, but unless it does it is no justification for forced labor."

It is recognized that one might reply by pointing out that the barber, porter restaurateur, waiter, etc. is always free to disengage from his occupation, and hence the servitude is not "involuntary". But while a plausible answer on the surface, such a reply is defective in two significant respects. First of all, it ignores the fundamental and even inherent right of any free person to obtain a living in any of the common occupations of society. Thus, it was stated by the United States Supreme Court in *Traux v. Aaich*, 239 U.S. 33, 41 (1915):

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure."

In the *Peonage Cases*, 123 Fed. 671, the Court spoke of the right to work as follows:

"One of the most valuable liberties of man is to work where he pleases, and to quit one employment and to go to another, subject, of course, to civil liability for breach of contract obligations. These laws attempt to take this right away and destroy this liberty."

To deprive a person of this basic right to pursue his calling, a right just as fundamental to his life and liberty as such other high priority freedoms, to wit, freedom of speech and freedom of religion, unless he furnishes labor or services for certain individuals for whom he does not desire to work is obviously coercion if not outright punishment. **When an individual is either coerced into working for another or punished for failure to do so, the inescapable conclusion is that such employment amounts to involuntary servitude.**

In *Robertson v. Baldwin*, 165 U.S. 275 (1897), Mr. Justice Harlan of that Court, dissenting from the Court's opinion, wrote that:

"the condition of one who contracts to render personal services in connection with the private business of another becomes a condition of involuntary servitude from the moment he is compelled against his will to continue in such service."

The Cornell Law Quarterly, Volume 49, No. 2, Winter, 1964, contains the most comprehensive collection of cases and arguments probably ever assembled regarding the Thirteenth Amendment. The article is entitled "Freedom Of Choice In Personal Service Occupations: Thirteenth Amendment Limitations On Antidiscrimination Legislation" and appears on pages 228-256. The author, Alfred Avins, makes this rather worldly comment on page 240:

"The thirteenth amendment gives every person the right to refrain from working for any other person.

It protects barbers, hotel clerks, shoe-shine man, sales clerks, waiters and waitresses, just as much as it protects cotton-pickers, field hands, or farm laborers. A waitress can no more be required to wait on all persons who come into her shop without discrimination than can a cotton-picker be required to pick cotton for all who want to hire him, without discrimination. The thirteenth amendment guarantees the right to refrain from work, from all work, from some work, or from work for some people. To coerce personal service is to impose involuntary servitude."

We think that the comments of Judge Mallory of the Washington State Supreme Court in the *Slenderella Systems* cases are so profound that at least the following part is worthy of repeating in closing:

"Discrimination is but another word for free choice. Indeed, he would not be free himself if he had no right so to do. In dealings between men, both cannot be free unless each acts voluntarily, otherwise one is subjected to the other's will."

This appellant, under the mandates of the Civil Rights Act of 1964 must make the choice of going out of business or going to jail in the person of its officers or serving Negro customers. In fact, there is no choice and the Act imposes involuntary servitude upon the appellant.

CONCLUSION

We submit that the appellant is entitled to the permanent injunction for which it prayed in its complaint, and for the following relief:

- (1) That Title II of the Civil Rights Act of 1964 be declared unconstitutional.
- (2) That the entire Civil Rights Act of 1964 be declared unconstitutional.

- (3) That the Attorney General of the United States of America be permanently enjoined from enforcing said Civil Rights Act of 1964 against appellant.
- (4) That appellant be awarded reasonable attorney's fee for the prosecution of this action and all cost, as prayed.

MORETON ROLLESTON, JR.
Attorney for Appellant

Post Office Address:

**1103 Citizens & Southern National Bank Building
 Atlanta, Georgia 30303**

APPENDIX

[fol. 115]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 9017

HEART OF ATLANTA MOTEL, INC., a Georgia corporation,
Plaintiff,

—versus—

THE UNITED STATES OF AMERICA and ROBERT F. KENNEDY
as the Attorney General of the United States, Defendant.

OPINION—July 22, 1964

This is a complaint filed by Heart of Atlanta Motel, a large downtown motel in the city of Atlanta, regularly catering to out of state guests, praying for a declaratory judgment and injunction to prevent the Attorney General of the United States from exercising powers granted to him under the Civil Rights Act of 1964, 42 U. S. C. A., Section 1971, as amended. The suit also attempts to obtain recovery from the United States for substantial damages alleged to result from a partial taking of the complainant's property without just compensation.

Conceding, as it does, that it is regularly engaged in renting sleeping accommodations to out of town guests, seventy-five percent of whom come from without the state of Georgia, and that it "has refused and intends to refuse to

rent sleeping accommodations to persons desiring said accommodations, for several different reasons, one of which is based on the grounds of race, unless ordered by this Court to comply with the provisions of the Civil Rights Act of 1964," the suit attacks the constitutionality of the public accommodations sections of the Civil Rights Act as applied to such a motel.

Since this is a suit seeking an injunction against the enforcement of a Federal statute on the alleged grounds that it is in violation of the United States Constitution, a three-judge court was convened as provided for in 28 U. S. C. A., Section 2282.

[fol. 116] The Attorney General filed a counterclaim seeking, on behalf of the United States, a temporary and permanent injunction against future violation of the Civil Rights Act by the plaintiff. The case was set down for hearing, and after the introduction of oral testimony on behalf of the United States, the signing of stipulations between the parties, and oral statements made by counsel for the plaintiff in open court, it appeared that no factual issues remained. The parties also conceded in open court that the matter might be treated as a hearing on the petition for the final permanent injunction.

In the first place, the claim of the plaintiff for damages against the United States on the alleged ground of deprivation of property without just compensation alleges no grounds for relief, entirely aside from the question whether such alleged deprivation would be justified by reason of the power of Congress to enact this particular legislation. This is so, because such a claim for damages or recovery for value of property taken by the Federal Government must be asserted in the United States Court of Claims unless the amount sought is not in excess of \$10,000. However, in the view we take of the law, such a suit is not maintainable in any event.

The real question presented by this complaint and counterclaim is whether Section 201(a), (b), (1) and (c) is constitutional.¹

[fol. 117] In substance, this section of Title II declares the right of every person to full and equal enjoyment of the goods, services and facilities of any hotel or motel which provides lodging to transient guests if it contains more than five rooms for rent or hire. The section is a congressional ascertainment and declaration of the fact that such "an establishment affect(s) commerce within the meaning of this Title."

Article I, Section 8, of the Constitution provides:

"Clause 1: The Congress shall have power . . . Clause 3: to regulate commerce with foreign nations and among the several states, and with the Indian tribes;" and Clause 18 "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers"

¹ "Sec. 201.(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin.

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

"(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b);"

In *United States v. Darby*, 312 U.S. 100, 118, the Supreme Court said:

"The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the grant of power of Congress to regulate interstate commerce. See *McCullough v. Maryland*, 4 Wheat 316, 421."

Thus, it need not be decided whether the outlawing of racial discrimination by a hotel accepting transient guests may be justified on the ground that it is actually in the stream of commerce. The power of Congress, when that body seeks to occupy the full extent of its powers under the Constitution, "extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to . . . the exercise of the granted power of Congress to regulate interstate commerce." Of course, the initial determination of whether the challenged regulation is such "appropriate means" is for Congress. Courts may not overturn such determination unless they conclude that under no reasonable theory could Congress find them "appropriate to the attainment" of its power to regulate commerce.

This Court, as recently as July 10, 1964, in the case of *Marriott Hotels of Atlanta, Inc. v. Heart of Atlanta Motel, Inc.*, C.A. No. 8832, held that the operations of Heart of Atlanta Motel (1) are in the stream of commerce, and that, in any event, (2) such operations affect commerce so as to [fol. 118] subject it to Congressional regulation under the Sherman Antitrust Act. It being undisputed that in the adoption of the Civil Rights Act of 1964, Congress has seen fit to exercise its full power as granted it under the Constitution the scope of its operation in this field must, therefore, be taken to be at least as broad as that which it exer-

cised in the adoption of the Sherman Act. Its scope is, therefore, also as broad as in the legislation affecting labor relations under the National Labor Relations Act. It is broader than that exercise by Congress in its regulation of wages and hours of services under the Wage and Hour laws.

In the specific field of hotel operations, the Supreme Court has ruled that the National Labor Relations Board could not lawfully follow a policy of refusing to take jurisdiction over unfair labor practices and other labor disputes in hotels and motels as a class. *Hotels Employees Local No. 255 v. Leedom*, 358 U.S. 99. Following that decision, the Court of Appeals of this judicial circuit in *N.L.R.B. v. Citizens Hotel Co.*, 5 Cir., 313 F. 2d 708, overruled a contention by the Citizens Hotel Company, operator of the Texas Hotel in Fort Worth, Texas, that its operations did not fall within the constitutional reach of the National Labor Relations Act because it was not either engaged in commerce, nor did its operations affect commerce. In arriving at that decision the court referred to the Supreme Court's opinion in *National Labor Relations Board v. Reliance Fuel Oil Corp.*, 371 U.S. 224. That case dealt with an attack by the local fuel oil corporation on the jurisdiction of the Labor Board because, while most of the products sold by Reliance had been acquired from Gulf Oil Corporation and had been delivered to it from without the state of New York, they nevertheless had been received and stored in the state before sales were made to Reliance. It was thus contended that Reliance was not engaged in commerce nor were its operations such as to affect commerce within the constitutional sense. The Supreme Court said:

"That activities such as those of Reliance affect commerce and are within the constitutional reach of Congress is beyond doubt. See e.g. *Wickard v. Filburn*, 317 U.S. 111."

The opinion also significantly quoted from the court's earlier decision in *Polish Alliance v. Labor Board*, 322 U.S. where, at page 648, it had said:

[fol. 119] "Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local, but in the interlacings of business across state lines adversely affect such commerce."

It is clear that the attack by the complainant on the constitutionality of these sections of the Civil Rights Act must fail. It is equally clear that the United States is entitled to the injunction prayed for by it in its counterclaim. An injunction will issue in the following terms:

[fol. 120] ORDER—July 22, 1964

The plaintiff, Heart of Atlanta Motel, Inc., a corporation, its successors, officers, attorneys, agents and employees, together with all persons in active concert or participation with them, are hereby enjoined from:

(a) Refusing to accept Negroes as guests in the motel by reason of their race or color;

(b) Making any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities, privileges, advantages or accommodations offered or made available to the guests of the motel, or to the general public, within or upon any of the premises of the Heart of Atlanta Motel, Inc.

So that the plaintiff may have an opportunity to prepare its record for appeal and, if so advised, seek a stay of this order, it is Ordered that the foregoing injunction shall become effective twenty (20) days from the date hereof, on, to-wit, the 11th day of August, 1964.

This 22nd day of July, 1964.

Elbert P. Tuttle, United States Circuit Judge, Frank
A. Hooper, United States District Judge, Lewis R.
Morgan, United States District Judge.

[fol. 121]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 9017

[Title omitted]

PERMANENT INJUNCTION—July 23, 1964

Pursuant to Order and Directions by the Three-Judge Court in the above stated case, and pursuant to Rule 58 of the Rules of Civil Procedure as amended January 21, 1963, the following Order in the above stated case on the prayers for temporary injunction is hereby entered.

ORDER

The plaintiff, Heart of Atlanta Motel, Inc., a corporation, its successors, officers, attorneys, agents and employees, together with all persons in active concert or participation with them, are hereby enjoined from:

(a) Refusing to accept Negroes as guests in the motel by reason of their race or color;

(b) Making any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities, privileges, advantages or accommodations offered or made available to the guests of the motel, or to the general [fol. 122] public, within or upon any of the premises of the Heart of Atlanta Motel, Inc.

So that the plaintiff may have an opportunity prepare its record for appeal and, if so advised, seek a stay of this Order, it is Ordered that the foregoing injunction shall become effective twenty (20) days from July 22, 1964, to-wit, the 11th day of August, 1964.

This the 23rd day of July, 1964.

B. G. Nash, Clerk of Court.

Supreme Court of the United States

Case No. 100

STATE OF ATLANTA MOTEL, INC.

UNITED STATES OF AMERICA

vs. STATE OF VIRGINIA, on behalf of the
COMMONWEALTH OF VIRGINIA

James Y. Burton
Attorney General of Virginia

Supreme Court Building
Richmond, Virginia

Frederick T. Gray
Special Assistant Attorney General

100 State Building
Richmond, Virginia

TABLE OF CONTENTS.

| | <i>Page</i> |
|-----------------------------|-------------|
| PRELIMINARY STATEMENT | 1 |
| ARGUMENT | |
| A—Seeking the Issue | 2 |
| B—The Commerce Clause | 4 |
| C—The Ninth Amendment | 7 |
| D—The Tenth Amendment | 7 |
| CONCLUSION | 8 |

TABLE OF CASES

| | |
|--|---|
| Brown v. Board of Education, 345 U. S. 972, 97 L. Ed. 1388, 73 S. Ct. 1114 | 4 |
| Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 835 | 6 |

IN THE
Supreme Court of the United States

No.

HEART OF ATLANTA MOTEL, INC.

v.

UNITED STATES OF AMERICA

**BRIEF AMICUS CURIAE ON BEHALF OF THE
COMMONWEALTH OF VIRGINIA.**

PRELIMINARY STATEMENT

In view of the limited time which the Court was able to allow for the preparation of Amicus briefs in this case and the work load of the personnel of the Staff of this office, it was impossible for us to undertake direct preparation of a brief. However, similar litigation is pending in the United States District Court for the Eastern District of Virginia in which John Vonetes, trading as Lee House Diner, is defendant. The litigant expressed a desire to have such brief prepared by his counsel and that has been done and the brief is adopted as the brief on behalf of the Commonwealth of Virginia.

ARGUMENT

A

Seeking the Issue

Time does not permit the writing of an exhaustive brief nor, in view of the nature of the brief, does such seem appropriate.

It is our position simply that in the enactment of Title II of the Civil Rights Act of 1964, Congress clearly and flagrantly exceeded the authority vested in it by the Constitution of the United States.

We have not had the benefit of brief setting forth the basis on which it might be argued that such legislation is Constitutional, but reference to the statement made by the Attorney General of the United States in his appearance before the Senate Judiciary Committee on July 16, 1963, reveals that he foresaw that "very far-reaching and grave issues would be raised by a bill resting solely upon the Fourteenth Amendment." Mr. Kennedy went on to say—

"That amendment deals only with state action, not individual action. To find state action in discriminations by private businesses solely because they are licensed by the state would impose on the legislation very heavy burdens which it need not carry.

"A decision by the Supreme Court upholding such a bill would require overruling the decision in the Civil Rights Cases of 1883. Passing and upholding a bill solely upon the licensing theory or some variation would have vast Constitutional implications. Not only would such a theory break new soil, but if the businesses with which we are concerned are state action because they

are licensed, then so are private educational establishments, charitable organizations, doctors, dentists, lawyers, and many other professional people for they are licensed too.

"Further there are serious practical problems. Under the licensing theory, the scope of the bill would depend upon what the various states decide to license or not to license. Any state which abandoned its licensing scheme could defeat the bill.

"Even today its application would vary from state to state, defeating the need for national uniformity on this great moral principle. In Alabama, for example, such legislation would cover such occupations as architects, embalmers, sleight-of hand artists and feather renovators but it would not reach department stores in Minnesota or, so far as we have found, hotels or motels in Pennsylvania.

"But although there are grave difficulties about the licensing theory, the Fourteenth Amendment gives valuable support for the proposed provisions * * *"

Finally, the Attorney General announced his view as to the constitutional basis for the legislation:

"I think this Constitutional theory might ultimately prevail, be upheld by this Supreme Court, but since there are uncertainties and potential difficulties, I believe it is essential that the bill be clearly limited to those establishments over which Congress has unquestioned power under the Commerce Clause."

Apparently, then the chief issue is whether the Commerce Clause permits such legislation.

The Commerce Clause

In *Brown v. Board of Education*, 345 U. S. 972, 97 L. Ed. 1388, 73 S.Ct. 1114; this Court was concerned with the scope of the Fourteenth Amendment and propounded to Counsel for discussion in briefs and arguments the following question:

“What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?”

We urge the Court to propound such question with respect to the contemplation and understanding of the framers of the Constitution insofar as the Commerce Clause and the Civil Rights Act of 1964 are concerned. Not even a distorted version of history could bring the Court to the view that the Commerce Clause was intended to empower Congress to enact such legislation.

Among other things, the Constitution was ordained and established to “secure the Blessings of Liberty.” Can anyone seriously maintain that our forefathers deemed it to be a part of “liberty” that the Congress of the United States could dictate to them those persons whom they must serve in their private business establishments?

What does history tell us of the Commerce Clause?

It was the necessity to regulate commerce that brought about the convention at Philadelphia in 1787 and there seems to have been no disagreement over the grant of power to Congress “to regulate commerce—among the several

States." The meaning of *regulate*, and that the Clause related only to *movement* over State lines, was so clear that it was hardly mentioned in the notes on debates. Later, in *The Federalist*, there was but one reference to the Clause, so clear was its meaning and its need. In No. 42, Madison wrote:

"A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former."

Nowhere in *The Federalist* is any broader idea expressed. Knocking down trade barriers was all that was sought. Where does "commerce" begin and end? There is no specific answer in *The Federalist*, but, in No. 11, Hamilton simply describes commerce as "a free circulation of commodities." The implication is clear that when circulation ends, commerce ends.

That the Commerce Clause was vital to the new government seemed to have been taken for granted by everyone, because a painstaking search of Elliot's Debates (covering the debates in the several state ratification conventions) shows that the proponents of ratification did not think it necessary to dwell upon it, and, indeed, it was not mentioned except in passing.

That the opponents of ratification had no fear of the Clause is clear, because not one of them attacked it specifically as a power which was likely to be abused. Patrick

Henry, a bitter opponent in the Virginia Convention, found trouble nearly everywhere else, but accepted the Commerce Clause. It is inconceivable that he and others like him—skilled in government and fearing centralization—would have suffered the power to remain unchallenged if they could have foreseen how loosely the courts would come to construe it, or that any such proposal as this would ever have been made. In time, more power over commerce was assumed, based upon the nature of the goods, and, later, the conditions under which they were manufactured. But no-one until today has seriously urged that the power should be all-inclusive and used as a sham to affect social “reform.”

Although Attorney General Kennedy referred to the “unquestioned power” of Congress under the Commerce Clause, it appears that in the Civil Rights Cases, 109 U. S. 3, 27 L.Ed. 835, there was a substantial question. One question involved was the Constitutional authority of Congress under any provision of the Constitution to enact a public accommodation law similar to Title II of the Civil Rights Law of 1964. The Court focused its attention on the then recently adopted Thirteenth, Fourteenth and Fifteenth Amendments, but how withering to those who now claim power under the Commerce Clause is the Court’s statement:

“* * * of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments * * *.”

What more conclusive evidence could be found of the Court’s understanding of the absence of such power in the Commerce Clause than the words “Of course” and “no one”?

In considering the Civil Rights Cases of 1883 we have

been unable to discover even the slightest intimation of power under the Commerce Clause in the briefs or even in Mr. Justice Harlan's exhaustive dissenting opinions. Surely, if the power is so clear today, some one would have had some slight hint of it in 1883.

C

The Ninth Amendment

Lying almost forgotten in the shadow of the struggle between the proponents of the Tenth Amendment and those of the Fourteenth in the battle over States Rights is the Ninth Amendment:

"The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

What does this language mean? It obviously is intended as a disclaimer of the doctrine of "*inclusio unius est exclusio alterius*." If that be true, then the people of the United States possessed rights not listed in or mentioned in the Constitution. Since the day of its ratification, one of those rights has been the right to discriminate in private business establishments such as those covered by the Civil Rights Law of 1964. How can it now be asserted that the Commerce Clause, which was already a part of the Constitution, has somehow destroyed that right?

D

The Tenth Amendment

If our premise is correct that the Ninth Amendment rec-

ognizes the existence of some rights which are unlisted and unmentioned in the Constitution, then the Tenth Amendment again becomes important. Irrespective of the effect of the Fourteenth Amendment on the reservation of power in the States which is announced in the Tenth Amendment, it is clear as Mr. Kennedy points out in his quoted statement "that Amendment deals only with state action, not individual action." Where then are we to look for a constitutional provision which affects the last clause of the Tenth Amendment?

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people.*"

We contend that the present legislation offends the Constitution because it clearly interferes with rights and powers reserved by the individual citizens. For Congress and this Court to construe the words "commerce" today in a manner inconsistent with the meaning attributed to it since the writing of the Constitution makes a mockery of the Constitution.

CONCLUSION

The issue before the Court is not whether it is morally proper for one man to discriminate against another on the basis of race. The issue is one of Constitutional law. Did Congress have the power to act? The Civil Rights Cases, *supra*, dispose of Fourteenth Amendment arguments—history disposes of the Commerce Clause. Even though such decision may offend the judgment of members of this Court

as to what the law should be, their decision as judges must be predicated on what the law is . . . !

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

Supreme Court Building
Richmond, Virginia

FREDERICK T. GRAY
Special Assistant Attorney General

1309 State-Planters Building
Richmond, Virginia

INDEX

| | Page |
|---|------|
| Opinion below..... | 1 |
| Jurisdiction..... | 1 |
| Questions presented..... | 2 |
| Statute involved..... | 2 |
| Statement..... | 4 |
| Summary of argument..... | 8 |
| Argument: | |
| Introduction..... | 13 |
| I. Title II of the Civil Rights Act of 1964, both in its general plan and as applied to petitioner, is a valid exercise of the power of Congress to regulate interstate commerce..... | 17 |
| A. Discrimination in places of public accom- modation imposes burdens upon the move- ment of interstate commerce of a kind which Congress has power to eliminate.. | 23 |
| Restaurants, lunch counters, etc..... | 29 |
| Theatres and other exhibitions..... | 34 |
| Related establishments..... | 37 |
| B. Discrimination in hotels and motels serving transient guests imposes burdens upon interstate travel of a kind which Con- gress has power to eliminate..... | 38 |
| 1. Racial discrimination in hotels and motels, in fact, burdens inter- state travel..... | 38 |
| 2. Congress has power to eliminate practices in hotels and motels that burden interstate travel..... | 46 |
| 3. Congress may constitutionally ex- tend its regulation of hotels and motels to the prohibition of dis- crimination against all guests whether traveling in interstate or local commerce..... | 53 |

Argument—Continued

| | |
|---|------------|
| II. Title II of the Civil Rights Act does not violate the Fifth Amendment..... | Page 56 |
| A. The prohibition of racial discrimination in motels does not deprive appellant of liberty or property without due process of law..... | 56 |
| B. The prohibition of racial discrimination in motels does not take appellant's property without just compensation..... | 60 |
| III. Title II of the Civil Rights Act does not violate the Thirteenth Amendment..... | 61 |
| Conclusion..... | 62 |
| Appendix A..... | 63 |
| Appendix B..... | 70 |
| Appendix C..... | 71 |

CITATIONS

Cases:

| | |
|--|----------------------------|
| <i>Ashwander v. Tennessee Valley Authority</i> , 297 U.S. 288..... | 22 |
| <i>Atlanta Biltmore Hotel Corp.</i> , 128 N.L.R.B. 364..... | 51, 52 |
| <i>Balaban & Katz</i> , 87 N.L.R.B. 1071..... | 35 |
| <i>Baldwin v. Morgan</i> , 287 F. 2d 750..... | 54 |
| <i>Bob-Lo Excursion Co. v. Michigan</i> , 333 U.S. 28..... | 59 |
| <i>Bolton & Hay</i> , 100 N.L.R.B. 361..... | 31 |
| <i>Bowles v. Willingham</i> , 321 U.S. 503..... | 58, 60 |
| <i>Boynton v. Virginia</i> , 364 U.S. 454..... | 11, 18, 20, 38, 47, 48, 50 |
| <i>Brandeis & Sons, J. L. v. Labor Board</i> , 142 F. 2d 977, certiorari denied, 323 U.S. 751..... | 30 |
| <i>Brennan's French Restaurant</i> , 129 N.L.R.B. 52..... | 31 |
| <i>Brooks v. United States</i> , 267 U.S. 432..... | 21 |
| <i>Butler v. Perry</i> , 240 U.S. 328..... | 12, 61 |
| <i>Butts v. Merchants & Miners Transp. Co.</i> , 230 U.S. 126..... | 16-17 |
| <i>Caminetti v. United States</i> , 242 U.S. 470..... | 18, 21 |
| <i>Canal St. Hotel</i> , 127 N.L.R.B. 880..... | 51 |
| <i>Case v. Bowles</i> , 327 U.S. 92..... | 22 |
| <i>Childs Co.</i> , 88 N.L.R.B. 720..... | 31 |
| <i>Childs Co.</i> , 93 N.L.R.B. 281..... | 31 |
| <i>Civil Rights Cases, The</i> , 109 U.S. 3..... | 15-16, 57, 61-62 |
| <i>Continental Airlines v. Colorado Anti-Discrimination Commission</i> , 372 U.S. 714..... | 59 |

Cases—Continued

| | |
|--|----------------|
| <i>Corrington & Cincinnati Bridge Co. v. Kentucky</i> , 154 U.S. 204..... | Page 18 |
| <i>Curran v. Wallace</i> , 306 U.S. 1..... | 38, 53, 54, 56 |
| <i>Daniel Ball, The</i> , 10 Wall. 557..... | 17 |
| <i>Discrimination-Interstate M. Carriers of Passengers</i> , 86 M.C.C. 743..... | 48, 55 |
| <i>District of Columbia v. John R. Thompson Co.</i> , 346 U.S. 100..... | 12, 13, 59-60 |
| <i>Edwards v. California</i> , 314 U.S. 160..... | 18, 39 |
| <i>Everard's Breweries v. Day</i> , 265 U.S. 545..... | 38, 54 |
| <i>Fashion Originators' Guild of America v. Federal Trade Commission</i> , 312 U.S. 457..... | 33-34 |
| <i>Federal Trade Commission v. Mandel Bros.</i> , 359 U.S. 385..... | 21 |
| <i>Federal Trade Commission v. Raladam Co.</i> , 316 U.S. 149..... | 21 |
| <i>Ferguson v. Skrupa</i> , 372 U.S. 726..... | 12, 57 |
| <i>Fitzgerald v. Pan American Airways</i> , 229 F. 2d 499..... | 47 |
| <i>Floridan Hotel of Tampa, Inc.</i> , 124 N.L.R.B. 261..... | 51, 52 |
| <i>Fox Midwest Amusement Corp.</i> , 98 N.L.R.B. 699..... | 35 |
| <i>A. C. Frost & Co. v. Coeur D'Alene Mines Corp.</i> , 312 U.S. 38..... | 21 |
| <i>Georgia v. United States</i> , 201 F. Supp. 813, affirmed, 371 U.S. 9..... | 48, 55 |
| <i>German Alliance Ins. Co. v. Kansas</i> , 233 U.S. 389..... | 60 |
| <i>Gibbons v. Ogden</i> , 9 Wheat. 1..... | 18 |
| <i>Gloucester Ferry Co. v. Pennsylvania</i> , 114 U.S. 196..... | 18 |
| <i>Goldman Theaters Inc. v. Loews Inc.</i> , 150 F. 2d 738, certiorari denied, 334 U.S. 811..... | 34 |
| <i>Hall v. De Cuir</i> , 95 U.S. 485..... | 18 |
| <i>Henderson v. Mayor of New York</i> , 92 U.S. 259..... | 18 |
| <i>Henderson v. United States</i> , 339 U.S. 816..... | 18, 20, 47 |
| <i>Hipolite Egg Co. v. United States</i> , 220 U.S. 45..... | 21 |
| <i>Hoke v. United States</i> , 227 U.S. 308..... | 18, 21 |
| <i>Hotel Employees Local No. 255 v. Leedom</i> , 358 U.S. 99..... | 50 |
| <i>Int'l Brotherhood v. Labor Board</i> , 341 U.S. 694..... | 30 |
| <i>Interstate Circuit v. United States</i> , 306 U.S. 208..... | 35-36 |
| <i>IPC Distributors v. Chicago Union</i> , 132 F. Supp. 294..... | 36 |
| <i>Joe Hunt's Restaurant</i> , 138 N.L.R.B. 470..... | 31 |
| <i>Kennedy v. Los Angeles Joint Board</i> , 192 F. Supp. 339..... | 31 |
| <i>Klor's v. Broadway-Hale Stores</i> , 359 U.S. 207..... | 34 |

Cases—Continued

| | Page |
|---|---------------|
| <i>Labor Board v. Baker Hotel</i> , 311 F. 2d 528..... | 51 |
| <i>Labor Board v. Bradford Dyeing Assn.</i> , 310 U.S. 318.. | 34 |
| <i>Labor Board v. Childs Co.</i> , 195 F. 2d 617..... | 31 |
| <i>Labor Board v. Citizens Hotel Co.</i> , 313 F. 2d 708..... | 51 |
| <i>Labor Board v. Combined Sentry Theatres, Inc.</i> , 278 F. 2d 306..... | 35 |
| <i>Labor Board v. Denver Bldg. & Const. Trades Council</i> , 341 U.S. 675..... | 20, 30 |
| <i>Labor Board v. Fainblatt</i> , 306 U.S. 601..... | 20 |
| <i>Labor Board v. Gamble Enterprises, Inc.</i> , 345 U.S. 117.. | 35 |
| <i>Labor Board v. Gene Compton's Corp.</i> , 262 F. 2d 653.. | 31 |
| <i>Labor Board v. Holiday Hotel Management Co., Inc.</i> , 311 F. 2d 380..... | 51 |
| <i>Labor Board v. Howard Johnson Co.</i> , 317 F. 2d 1, certiorari denied, 375 U.S. 920..... | 31 |
| <i>Labor Board v. Jones & Laughlin Steel Corp.</i> , 301 U.S. 1..... | 17-18, 19, 21 |
| <i>Labor Board v. Laundry Drivers Local</i> , 262 F. 2d 617.... | 31 |
| <i>Labor Board v. Local Joint Board</i> , 301 F. 2d 149..... | 31 |
| <i>Labor Board v. Morrison Cafeteria Co. of Little Rock</i> , 311 F. 2d 534..... | 31 |
| <i>Labor Board v. Reliance Fuel Corp.</i> , 371 U.S. 224. 9, 19-20, 30 | |
| <i>Lamar Hotel</i> , 127 N.I.R.B. 885..... | 51 |
| <i>Lane v. Cotton</i> , 12 Mod. 472..... | 58, 61 |
| <i>Legal Tender Cases</i> , 12 Wall. 457..... | 60 |
| <i>Lewis v. Greyhound</i> , 199 F. Supp. 210..... | 49 |
| <i>Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.</i> , 335 U.S. 525..... | 58 |
| <i>Local 74 v. Labor Board</i> , 341 U.S. 707..... | 30 |
| <i>Lottery Case, The</i> , 188 U.S. 321..... | 21 |
| <i>Marriott Hotels of Atlanta, Inc. v. Heart of Atlanta Motel, Inc.</i> , C.A. No. 8832 (N.D. Ga., July 10, 1964)..... | 8 |
| <i>Matveychuk v. United States</i> , 116 Ct. Cl. 859..... | 60 |
| <i>May Department Stores Co. v. Labor Board</i> , 326 U.S. 376..... | 30 |
| <i>Mayor of New York v. Miln</i> , 11 Pet. 102..... | 18 |
| <i>McCulloch v. Maryland</i> ; 4 Wheat. 316..... | 19 |
| <i>McLeod v. Bakery Drivers Local</i> , 204 F. Supp. 288.... | 30 |
| <i>Mil-Bur, Inc.</i> , 94 N.L.R.B. 1161..... | 31 |
| <i>Mitchell v. United States</i> , 313 U.S. 80..... | 18, 20, 47 |
| <i>Mobile County v. Kimball</i> , 102 U.S. 691..... | 17 |

Cases—Continued

| | Page |
|--|------------|
| <i>Moore v. Mead's Fine Bread Co.</i> , 348 U.S. 115..... | 21 |
| <i>Morgan v. Virginia</i> , 328 U.S. 373..... | 18, 48, 49 |
| <i>Munn v. Illinois</i> , 94 U.S. 113..... | 56 |
| <i>N.A.A.C.P. v. St. Louis-San Francisco Ry. Co.</i> , 297 I.C.C. 335..... | 48 |
| <i>Oklahoma v. Atkinson Co.</i> , 313 U.S. 508..... | 22 |
| <i>Omnia Co. v. United States</i> , 261 U.S. 502..... | 60 |
| <i>Passenger Cases, The</i> , 7 How. 283..... | 18 |
| <i>Polish Alliance Ins. Co. v. Labor Board</i> , 322 U.S. 643..... | 20 |
| <i>Purity Extract Co. v. Lynch</i> , 226 U.S. 192..... | 38 |
| <i>Radovich v. Nat'l Football League</i> , 352 U.S. 445..... | 36 |
| <i>Railway Employees Dep't v. Hanson</i> , 351 U.S. 225..... | 21 |
| <i>Railway Mail Association v. Corsi</i> , 326 U.S. 88..... | 59 |
| <i>Retail Fruits & Vegetable Union v. Labor Board</i> , 249 F. 2d 591..... | 30 |
| <i>Rez v. Ivens</i> , 7 Carr. & Payne, 213..... | 61 |
| <i>Ruppert, Jacob v. Caffey</i> , 351 U.S. 264..... | 60 |
| <i>Samoff v. Hotel, Motel, & Club Employees Union</i> , 199 F. Supp. 265..... | 51 |
| <i>Securities and Exchange Commission v. Ralston Purina Co.</i> , 346 U.S. 119..... | 21 |
| <i>Shreveport, City of v. United States</i> , 210 F. Supp. 36, affirmed, 316 F. 2d 928..... | 48, 49 |
| <i>Shreveport Rate Cases</i> , 234 U.S. 342..... | 53 |
| <i>Snyder v. United States</i> , 113 Ct. Cl. 61..... | 60 |
| <i>Southern Railway Co. v. United States</i> , 222 U.S. 20..... | 53, 56 |
| <i>Southwest Hotels, Inc.</i> , 126 N.L.R.B. 1151..... | 51, 52, 53 |
| <i>Sperry v. Local Joint Board</i> , 216 F. Supp. 263, affirmed, 323 F. 2d 75..... | 51 |
| <i>Steele v. Louisville & Nashville Railroad Co.</i> , 323 U.S. 192..... | 21 |
| <i>Stork Restaurant, Inc.</i> , 130 N.L.R.B. 543..... | 31 |
| <i>Stouffer Corp., The</i> , 101 N.L.R.B. 1331..... | 31 |
| <i>Thornton v. United States</i> , 271 U.S. 414..... | 53, 54, 56 |
| <i>Trade Winds Motor Hotel</i> , 140 N.L.R.B. 567..... | 51 |
| <i>Tulsa Hotel Management Corp.</i> , 135 N.L.R.B. 968..... | 51 |
| <i>United States v. Baltimore & Ohio R.R. Co.</i> , 333 U.S. 169..... | 21 |
| <i>United States v. Central Eureka Mining Co.</i> , 357 U.S. 155..... | 12, 60 |
| <i>United States v. Darby</i> , 312 U.S. 100. 7, 19, 22, 38, 53, 58, 60 | |

Cases—Continued

| | |
|---|-----------------------------------|
| <i>United States v. First National Pictures Inc.</i> , 282 U.S. 44..... | Page 33 |
| <i>United States v. Hill</i> , 248 U.S. 420..... | 18 |
| <i>United States v. I.B.C.</i> , 348 U.S. 236..... | 36 |
| <i>United States v. City of Jackson</i> , 318 F. 2d 1..... | 48, 49 |
| <i>United States v. Lassiter</i> , 203 F. Supp. 20, affirmed, 371 U.S. 10..... | 48, 49 |
| <i>United States v. City of Montgomery</i> , 201 F. Supp. 590..... | |
| <i>United States v. Rock-Royal Corp.</i> , 307 U.S. 533..... | 48, 49, 58 |
| <i>United States v. City of Shreveport</i> , 210 F. Supp. 708, affirmed, 316 F. 2d 928..... | 48, 49 |
| <i>United States v. Shubert</i> , 348 U.S. 222..... | 36 |
| <i>United States v. Sprague</i> , 282 U.S. 716..... | 22 |
| <i>United States v. Sullivan</i> , 332 U.S. 689..... | 21 |
| <i>United States v. Women's Sportswear Manufacturers Ass'n.</i> , 336 U.S. 460..... | 19 |
| <i>West Coast Hotel Co. v. Parrish</i> , 300 U.S. 379..... | 58 |
| <i>White Bear Theatre v. State Theatre Corp.</i> , 129 F. 2d 600..... | 36 |
| <i>Wickard v. Filburn</i> , 317 U.S. 111..... | 20, 29 |
| <i>Williams v. Howard Johnson's Restaurant</i> , 268 F. 2d 845..... | 49 |
| <i>Williams v. Howard Johnson's Restaurant</i> , 323 F. 2d 102..... | 49 |
| <i>Williamson v. Lee Optical Co.</i> , 348 U.S. 483..... | 58 |
| <i>Youngsclause v. Omaha Film Board</i> , 60 F. 2d 538..... | 36 |
| U.S. Constitution and Statutes: | |
| Art. I, Sec. 8; Cl. 3..... | 15, 17 |
| Fifth Amendment..... | 12, 15, 17, 56, 57, 60 |
| Ninth Amendment..... | 21-22 |
| Tenth Amendment..... | 21-22 |
| Thirteenth Amendment..... | 12, 15, 16, 17, 59, 61 |
| Fourteenth Amendment, Section 5..... | 15, 16, 59 |
| Fifteenth Amendment..... | 59 |
| Civil Rights Act of 1964, 78 Stat. 241..... | 4 |
| Title II..... | 12, 17, 22-23 |
| Sec. 201(a)..... | 2, 7, 8, 9, 13, 29, 37, 63 |
| Sec. 201(b)..... | 2, 7, 8-9, 13, 14, 34, 37, 53, 63 |
| Sec. 201(c)..... | 3, 7, 9, 13, 29, 34, 53, 64 |
| Sec. 201(d)..... | 14, 65 |
| Sec. 201(e)..... | 65 |
| Sec. 202..... | 65 |

U.S. Constitution and Statutes—Continued

Civil Rights Act of 1964, 78 Stat. 241—Continued

Title II—Continued

| | Page |
|--|------------------------|
| Sec. 203..... | 65 |
| Sec. 204..... | 65 |
| Sec. 205..... | 67 |
| Sec. 206(a)..... | 3, 6, 67 |
| Sec. 206(b)..... | 3, 7, 68 |
| Sec. 207..... | 69 |
| Federal Aviation Act, 49 U.S.C. 1374(b)..... | 48 |
| 28 U.S.C. 2282..... | 6 |
| 49 U.S.C. 3(1)..... | 47 |
| 49 U.S.C. 316(d)..... | 47 |
| 49 U.S.C. 1374(B)..... | 47 |
| Miscellaneous: | |
| 110 Cong. Rec. 6311 (daily ed.)..... | 43 |
| 110 Cong. Rec. 6315 (daily ed.)..... | 45 |
| 110 Cong. Rec. 7980 (daily ed.)..... | 24 |
| 110 Cong. Rec. 13776 (daily ed.)..... | 6 |
| 110 Cong. Rec. 15363 (daily ed.)..... | 7 |
| Hearings before the Committee on Commerce, United States Senate, 88th Cong., 1st Sess., on S. 1732, Part 2, Ser. No. 27..... | 25, |
| 26-27, 28, 32, 33, 39, 40, 41-42, 43, 44, 45-46, 53 | |
| Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 88th Cong., 1st Sess., on Miscellaneous proposals regarding civil rights, Ser. No. 4, Part II..... | 23-24, 42, 43 |
| Hearings before the Committee on the Judiciary, United States Senate, 88th Cong., 1st Sess., on S. 1731..... | 24 |
| Interstate Commerce Commission Regulation, 49 C.F.R. 180a, 26 F.R. 9166..... | 48 |
| Report of the Committee on Commerce, United States Senate, on S. 1732, S. Rept. No. 872, 88th Cong., 2d Sess..... | 24, 35, 39, 41, 44, 46 |
| Report of the House Judiciary Committee, 88th Cong., 1st Sess., H. Rept. No. 914, Part 2, on H.R. 7152, December 2, 1968..... | 27-28, 43, 44, 46 |

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 515

HEART OF ATLANTA MOTEL, INC., APPELLANT

v.

**THE UNITED STATES OF AMERICA AND ROBERT F.
KENNEDY, AS THE ATTORNEY GENERAL OF THE
UNITED STATES OF AMERICA, APPELLEES**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA**

BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the three-judge district court (R. 74) is reported at 231 F. Supp. 393.

JURISDICTION

The order of the district court granting a permanent injunction (R. 78-80) was entered on July 23, 1964. Notice of appeal to this Court was filed on July 30, 1964 (R. 81). Jurisdiction is conferred on this Court by 28 U.S.C. 1253, and by section 206(b) of the Civil Rights Act of 1964, 78 Stat. 245.

Although probable jurisdiction has not yet been formally noted, the case is obviously one of national importance and warrants full consideration. As the Court is aware, the parties have agreed, in order to expedite a hearing of the cause, to file full briefs in advance of the notation of jurisdiction.

QUESTIONS PRESENTED

1. Whether Sections 201(a), (b)(1), and (c)(1) of the Civil Rights Act of 1964, which prohibit racial discrimination in any inn, motel, hotel, or other establishment which provides lodging to transient guests, constitute a lawful exercise of the power of Congress to regulate commerce among the several States.

2. Whether the statute deprives the appellant corporation of rights guaranteed by the Fifth and Thirteenth Amendments to the Constitution.

STATUTE INVOLVED

Sections 201 and 206 of Title II of the Civil Rights Act of 1964, 78 Stat. 243, 245, provide in pertinent part as follows:

SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimi-

nation or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

* * * *

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); * * *

* * * *

SEC. 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) In any such proceeding the Attorney General may file with the clerk of such a court

a request that a court of three judges be convened to hear and determine the case. * * * An appeal from the final judgment of such court will lie to the Supreme Court.

STATEMENT

On July 2, 1964, the President of the United States signed into law the Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241. On the same day appellant, Heart of Atlanta Motel, Inc., filed a complaint in the United States District Court for the Northern District of Georgia, attacking the constitutionality of Title II of the Act and seeking damages, declaratory relief, and an injunction against the United States of America and Robert F. Kennedy, then the Attorney General of the United States (R. 5), on the ground of injuries to appellant which allegedly would result from enforcement of the Act.

The facts stipulated before the district court (R. 17, 32) show that appellant corporation owns and operates a motel in Atlanta, Georgia, with 216 rooms for lease to transient guests. Approximately 75 percent of its guests come from outside Georgia, and appellant accepts convention trade from outside the State. Besides maintaining over fifty billboards and highway signs advertising the motel on highways in Georgia, appellant solicits patronage for the motel from outside the State through various national advertising media, including magazines having a national circulation.

The complaint as amended¹ alleged that sections 201(a), (b)(1), and (c)(1) of the 1964 Act, which

¹ An amendment to the complaint was filed on July 15, 1964 (R. 13).

prohibit racial discrimination in enumerated "place[s] of public accommodation", including hotels and motels, exceeded the power of Congress to regulate commerce among the several States (R. 9), deprived appellant of liberty, freedom of contract, and property without due process of law, took its property without just compensation (R. 8, 14), and subjected it to involuntary servitude contrary to the Thirteenth Amendment (R. 13). The complaint stated further that appellant "has never rented sleeping accommodations to members of the negro race" and "has refused and intends to refuse to rent sleeping accommodations to persons desiring said accommodations, for several different reasons, one of which is based on the ground of race." (R. 6, 7). This policy is followed "because plaintiff corporation determined that such exclusion was in the best interest of plaintiff's business and was necessary to protect plaintiff's property, trade, profits and reputation," which would, if the Act were enforced, be subjected to "irreparable damages" by the loss of "a large percentage of its customers, income and good will * * *" (R. 7, 8, 10).

On July 10, 1964, the government answered the complaint (R. 21-24) and counterclaimed (R. 22), asserting the constitutionality of the Act and its application to the appellant. The counterclaim alleged that the motel "has refused, is refusing and has announced that, unless enjoined by this Court, it will continue to pursue its policy of refusing accommodations * * * to Negroes on account of their race or color" (R. 22); and that these "acts and practices" constitute a "pattern and practice of resistance" (R.

22) to the rights secured by Title II of the 1964 Act, thus entitling the Attorney General to institute a civil action (and hence to file a counterclaim) to enforce the Act. See Section 206(a), Civil Rights Act of 1964.² The counterclaim sought a preliminary and permanent injunction restraining the appellant from continuing to violate the Act (R. 18, 23-24).

A district court of three judges³ was convened (R. 2) both because the complaint sought an injunction restraining enforcement of an Act of Congress on the ground of "repugnance to the Constitution of the United States" (28 U.S.C. 2282) (R. 75) and because the Attorney General's counterclaim alleged a "pattern and practice of resistance" to the rights granted by Title II of the 1964 Act (R. 22) and the Attorney General had certified that the case was one of "general public importance" (R. 20).⁴ Sections 206 (a),

² A second counterclaim, making similar allegations of violation of the statute with respect to a restaurant located within the motel (R. 23), was dismissed by the Court, on motion of the Attorney General (R. 27-28), on the ground that the restaurant, operated by a lessee of the appellant (R. 16), had been complying with and intended to continue to comply with the law (R. 16).

³ Chief Judge Tuttle of the Court of Appeals for the Fifth Circuit, and District Judges Hooper and Morgan of the Northern District of Georgia.

⁴ Violation of the law by a single business entity constitutes a "pattern or practice" if it is pursuant to a continuing policy of the business. The language of Section 206(a) allows suit wherever "any person . . . is engaged in a pattern or practice of resistance" to the Act. The legislative history is equally explicit. Senator Humphrey, leading majority proponent of the bill, stated (110 Cong. Rec. 13776 (daily ed.)):

"Such a pattern or practice would be present only when the denial of rights consists of something more than an isolated,

(b), Civil Rights Act of 1964. On July 17, 1964, the conflicting motions for preliminary injunctions were heard by the court. The government offered evidence that appellant had refused, after passage of the Act, to accommodate Negro guests because of their race and color (R. 33-41). Appellant presented no evidence (R. 41), resting on the pleadings and the stipulation of facts.

The district court rendered its unanimous decision on July 22, 1964, sustaining the validity of sections 201(a), (b)(1), and (c)(1) (R. 74-78), and entering a permanent injunction restraining appellant from continuing to violate the Act (R. 78-80).⁵ Quoting *United States v. Darby*, 312 U.S. 100, 118, the court noted that the power of Congress "extends to those activities intrastate which so affect interstate commerce * * * as to make regulation of them appropriate means to * * * the exercise of the granted power of

sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice * * * if a company repeatedly and regularly engaged in acts prohibited by the statute." (Emphasis added.)

Congressman Celler, Chairman of the House Judiciary Committee and principal spokesman for the bill in the House made clear the same intent (110 Cong. Rec. 15363 (daily ed.)): "A pattern or practice of resistance would exist * * * where a single company regularly refused to treat Negroes without discrimination." Thus a "pattern or practice" of discrimination was established in this case, where the record shows an announced policy of the appellant not to comply with the statute and not to provide lodging to any Negro in the future unless compelled to do so by court order.

⁵The court noted that the parties had conceded that the matter might be treated as a proceeding on an application for a permanent (as well as a preliminary) injunction (R. 73, 75).

Congress to regulate interstate commerce," and that it had, not two weeks before, held * that appellant's operations so affected interstate commerce as to render it subject to the Sherman Antitrust Act. (R. 77-78.) Similarly, hotel operations were, the court observed, subject to the National Labor Relations Act. In the light of those precedents, the court concluded that Congress had ample power to enact Title II of the Civil Rights Act of 1964. It therefore entered an order restraining appellant from (R. 80):

(a) refusing to accept Negroes as guests in the motel by reason of their race or color;

(b) making any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities, privileges, advantages or accommodations offered or made available to the guests of the motel, or to the general public, within or upon any of the premises of the Heart of Atlanta Motel, Inc.

The court stayed the injunction until August 11, 1964, to allow appellant an opportunity to prepare its record for appeal and, "if so advised," to seek a stay (R. 79, 80). A stay was sought in this Court and denied by Mr. Justice Black on August 10, 1964.

SUMMARY OF ARGUMENT

Section 201(a) of the Civil Rights Act of 1964 requires "any place of public accommodation" whose operations affect commerce to serve all persons "without discrimination or segregation on the ground of race, color, religion, or national origin". Section

* *Marriott Hotels of Atlanta, Inc. v. Heart of Atlanta Motel, Inc.*, C.A. No. 8832 (N.D. Ga., July 10, 1964).

201(b) provides (with a single exception not relevant here) that any hotel or motel which provides lodging to transient guests is a "place of public accommodation," and Section 201(c) states that the operations of all such establishments are deemed to affect commerce. Restaurants and gasoline stations are also "place[s] of public accommodation" within the meaning of Section 201 (a) and (b), but they are subject to the statute only if a substantial portion of the food or products they sell "has moved in commerce" (or if they serve interstate travelers). Theaters and other places exhibiting theatrical or athletic events are covered if the films or persons providing entertainment move in interstate commerce. The statute, if constitutional, is admittedly applicable to appellant's motel. The sole question here is the constitutionality of the statute.

1. Under established principles, the commerce power is amply broad enough to sustain both the general prohibition of discrimination in places of public accommodation and its particular application to hotels and motels. Congress has power to promote and encourage interstate commerce and travel by prohibiting activities that interfere with that commerce, where the interference results from local activities engaged in by large numbers of persons even though each enterprise alone is relatively small. See *Labor Board v. Reliance Fuel Corp.*, 371 U.S. 224. This is the situation with regard to racial discrimination in places of public accommodation. Having before it evidence that the commerce of whole sections of the country was being impeded by racial discrimination and disrupted by the resulting boycotts, picketing,

mass demonstrations and the other weapons of economic and social disputes, Congress attacked the problem on a broad front. In implementing its objective, however, it followed established lines of authority. It regulated restaurants and gas stations which obtain a significant portion of the goods they sell from other States, on two grounds. *First*, racial disputes, like labor disputes, discourage patronage and interfere with business; they thereby interfere with and reduce purchases-for-resale from other States. *Second*, the refusal of such retail establishments to serve Negro consumers, like a group boycott forbidden by the Sherman Act, imposes a wholly arbitrary limitation on the market by eliminating an important source of potential demand for goods from other States. Similar principles justify the prohibition of discrimination by theaters and other places exhibiting motion pictures, athletic events, or other forms of live entertainment.

The basis for forbidding racial discrimination by hotels and motels, such as that operated by appellant, is equally clear. The testimony before Congress shows that the unavailability to Negroes of adequate places of lodging interferes significantly with interstate travel. Negroes are required to travel excessive distances between places of lodging, are subjected to the humiliation of frequent rebuffs, are often forced to travel circuitous routes to find lodging, and must frequently accept inferior accommodations. The predictable result—a significant deterrence of interstate travel by Negroes—has in fact occurred.

The power of Congress, under the commerce clause, to remove these burdens and alleviate these hardships is clearly established. Racial discrimination by interstate motor, rail, and air carriers has been forbidden for years. The prohibition extends not only to the carriers themselves but to the terminal facilities they use, *e.g.*, a terminal restaurant. The power of Congress is clear, for, as this Court said in *Boynton v. Virginia*, 364 U.S. 454, 463, interstate travelers "have to eat" and a terminal restaurant exists for the very purpose of serving the need of intrastate and interstate travelers. Similarly, interstate travelers have to sleep, and hotels and motels are devoted to serving this need of both local and interstate travelers. Indeed, because of the burden which a lack of hotel accommodations imposes on interstate travel, the National Labor Relations Board has frequently assumed jurisdiction (with the Court's explicit approval) over the labor relations of hotels. The effect on travel of a denial of lodging accommodations to Negroes is, of course, at least as significant, certain, and direct as is the effect on travel of an unfair labor practice engaged in by a hotel.

Finally, elimination of the burden on interstate travel resulting from a refusal to furnish equal lodging accommodations to Negroes requires and justifies a prohibition of discrimination against all Negroes, whether they are engaged in intrastate or interstate travel. Congress acted well within its prerogatives in deciding that Negro interstate travelers should not

be subjected either to the risk of being unable to prove their "interstate status" or to the burden of carrying some form of proof; either alternative interferes with interstate travel. More basically, requiring Negroes to prove their "interstate status," while whites evidently were not subjected to that requirement, would impose upon Negro travelers the very discrimination that the Act was intended to prevent.

2. Title II of the Civil Rights Act of 1964 does not violate appellant's rights under the Fifth Amendment. The "due process" clause grants no immunity from reasonable regulations of business and commercial activity. *Ferguson v. Skrupa*, 372 U.S. 726. Both the existence of the common law innkeeper's obligation and this Court's decisions upholding local anti-discrimination laws testify to the reasonableness of the regulation of hotels and motels imposed in this case. See, *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100. Nor was appellant's property taken without just compensation. Such consequential damage as a person may suffer from valid regulation of a business does not constitute a "taking" within the meaning of the Fifth Amendment. *United States v. Central Eureka Mining Co.*, 357 U.S. 155.

3. Appellant corporation is not subjected to involuntary servitude in violation of the Thirteenth Amendment. A requirement of furnishing equal treatment to Negroes as a condition of operating a particular business is not a requirement "akin to African slavery." *Butler v. Perry*, 240 U.S. 328, 332. The present statute was preceded by public accom-

modation laws in thirty States and the District of Columbia (see *District of Columbia v. John R. Thompson Co.*, *supra*) and these in turn merely extend the common-law innkeeper rule. Certainly the framers of the Thirteenth Amendment, who hoped to remove the disabilities imposed on Negroes, did not intend either to invalidate the innkeeper rule or place discrimination in places of public accommodation beyond the reach of both federal and State law.

ARGUMENT

INTRODUCTION

Section 201(a) of the Civil Rights Act of 1964 provides—

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation * * *, without discrimination or segregation on the ground of race, color, religion, or national origin.

Section 201(b) lists four kinds of business establishment each of which is defined as a place of public accommodation, within the meaning of Section 201(a) if either of two bases of coverage is satisfied, *viz*—

if its operations affect commerce, or if discrimination or segregation by it is supported by State action.

Section 201(c) defines the meaning of the phrase "affect commerce," as applied to each kind of establishment listed in Section 201(b). The first is "any inn, hotel, motel, or other establishment which pro-

vides lodging to transient guests.”’ Such establishments are deemed *per se* to affect commerce. Restaurants, cafeterias, lunchrooms and similar facilities, and also gasoline stations, make up the second class. They are declared to affect interstate commerce within the meaning of Title II if they serve interstate travelers or if a substantial portion of the food which they serve or products which they sell “has moved in commerce.” The third class—motion picture houses and other places of exhibition—are deemed to affect commerce if the films or persons providing the entertainment move in interstate commerce. The fourth class is made up of establishments which are an integral part of any of the foregoing places of public accommodation.

Section 201(d) defines the meaning of “supported by State action.”

The statute, if constitutional, is admittedly applicable to appellant’s place of business under the first ground of coverage. It is a “motel” which provides lodging to transient guests, and it does not fall within the only relevant exception.⁸ It is also undisputed that appellant did in fact refuse to provide lodging to Negroes on account of their race and color, and intends to continue the discrimination in the absence of a court order. The sole question here, is the constitutionality of the statute, which appellant claims

⁷ There is an exception for “an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence.” Section 201(b)(1).

⁸ Note 7, *supra*.

exceeds the power of Congress, invades the reserved powers of the States, and violates the limitations imposed by the Fifth and Thirteenth Amendments.*

The provisions summarized above make it plain that Congress invoked both its power to regulate interstate commerce under Article I, Section 8, clause 3, and also its power under Section 5 of the Fourteenth Amendment to enforce, by appropriate legislation, the provisions of that Amendment. The stipulation before the district court shows that 75 percent of appellant's guests come from outside the State of Georgia, that appellant accepts convention trade from other States, and that appellant widely solicits patronage in advertising media having a national circulation. Accordingly, the government has proceeded throughout this litigation upon the theory that the constitutionality of Title II, as applied to appellant, may be sustained under the commerce clause without reference to the additional power conferred by Section 5 of the Fourteenth Amendment. We stake our case here upon the same theory.

The decision in the *Civil Rights Cases*, 109 U.S. 3, is therefore irrelevant. In declaring unconstitutional the Act of 1875 (which prohibited discrimination in "inns, public conveyances on land or water, theaters, and other places of public amusement," 18 Stat. 335, 336), the Court did not consider whether the Act would have been constitutional if Congress had attempted to exercise its commerce power; for, as the

* See amended notice of appeal (R. '83): "The sole question presented by the appeal is the constitutionality of the Civil Rights Act of 1964."

Court noted, the statute was "not conceived in any such view" (*id.* at 19).¹⁰ The Court's observation that "[o]f course, no one will contend that the power to pass it was contained in the Constitution before adoption of the last three amendments" (*id.* at 10), was directed to the statute as it came before the Court, a law covering many local inns, public conveyances and theatres without regard to their relation to interstate commerce and therefore obviously conceived in a different view. The holding of the *Civil Rights Cases*, therefore, is necessarily limited to the proposition that, in the circumstances presented, the Act could not be sustained under the Thirteenth and Fourteenth Amendments.¹¹ This limitation is made entirely clear by the subsequent decision in *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126, where it was argued that the Act of 1875 should be held valid as applied to a vessel under the exclusive admiralty jurisdiction of the United States. The Court rejected the contention on the ground that the *Civil Rights Cases* had held that the provisions of the 1875 Act received "no support from the power of Congress to regulate interstate commerce because, as is shown by the preamble and

¹⁰ The point was barely noted by counsel as we will explain in more detail in our brief in *Katzenbach v. McClung*, No. —, this Term.

¹¹ We refer to "the circumstances presented" because the Court, in the *Civil Rights Cases*, expressly assumed the availability of a State remedy for the discrimination covered by the federal statute (109 U.S. at 19, 24-25). We also wish to point out that in stressing the commerce power in the instant brief—a power which we believe to be clearly and completely dispositive of the case—we imply no suggestion that the Act may not be sustained as an exercise of the power conferred by Section 5 of the Fourteenth Amendment.

by their terms, they were not enacted in the exertion of that power * * *." 230 U.S. at 132. The 1964 Act explicitly relies upon the power of Congress to regulate interstate commerce. As we now show, the Act plainly represents a permissible exercise of that power. Thereafter, we take up the arguments under the Fifth and Thirteenth Amendments.

I

TITLE II OF THE CIVIL RIGHTS ACT OF 1964, BOTH IN ITS GENERAL PLAN AND AS APPLIED TO PETITIONER, IS A VALID EXERCISE OF THE POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE

Article I, Section 8, clause 3, of the Constitution confers upon the federal Congress power "to regulate Commerce * * * among the several States." In arguing that the commerce power is broad enough to sustain both the general plan of Title II and also its specific application to petitioner, we invoke no novel constitutional doctrine and seek no extension of existing principles. The constitutionality of Title II, under the commerce clause, is established by five established rules. All five are a familiar part of our constitutional history.

First. The delegation to Congress of power to regulate commerce among the several States "authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce" (*The Daniel Ball*, 10 Wall. 557, 564), and "to promote its growth" (*Mobile County v. Kimball*, 102 U.S. 691, 696, 697). This principle, established many years ago, has been frequently reiterated. *E.g.*, *Labor*

Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-37. Interstate commerce, needless to say, includes interstate travel by men and women. *Edwards v. California*, 314 U.S. 160.¹²

Second. The power of Congress to promote commerce among the States includes the power to regulate local activities—in the State of destination as well as the State of origin—which might have a substantial and harmful effect upon interstate com-

¹² “[I]t is settled beyond question that the transportation of persons is ‘commerce,’ within the meaning of” the commerce clause. *Edwards v. California*, 314 U.S. 160, 172. “The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution * * *.” *Caminetti v. United States*, 242 U.S. 470, 491. “Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, * * * as well as the purchase, sale and exchange of commodities.” *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203. To the same effect, see *United States v. Hill*, 248 U.S. 420, 423; *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204, 218-219; *Hoke v. United States*, 227 U.S. 308, 320. Accord: *Mitchell v. United States*, 313 U.S. 80; *Henderson v. United States*, 339 U.S. 816; *Boynton v. Virginia*, 364 U.S. 454; *Morgan v. Virginia*, 328 U.S. 373; *Hall v. De Cuir*, 95 U.S. 485.

Moreover, “[i]t is immaterial whether or not the transportation is commercial in character. See *Caminetti v. United States*, *supra*.” *Edwards v. California*, *supra* at 172 n. 1.

While, as appellant says, Mr. Justice Barbour in *Mayor of New York v. Miln*, 11 Pet. 102, 136, decided in 1837, suggested that only goods and not persons are “the subjects of commerce” within the constitutional provision, that decision—insofar as it may have held any such thing—was overruled in the *Passenger Cases*, 7 How. 283, and in *Henderson v. Mayor of New York*, 92 U.S. 259. Indeed, the suggestion in *Miln* was quite inconsistent with the broad language of *Gibbons v. Ogden*, 9 Wheat. 1.

merce. "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Manufacturers Ass'n.*, 336 U.S. 460, 464. "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch v. Maryland*, 4 Wheat. 316, 21." *United States v. Darby*, 312 U.S. 100, 118-119 (per Mr. Chief Justice Stone).

Third. The power of Congress to regulate activities affecting interstate commerce is not to be determined by looking only at the quantitative effect of the individual activities of the person or enterprise immediately involved in litigation. "Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Labor*

Board v. Reliance Fuel Corp., 371 U.S. 224, 226. This principle is illustrated by *Wickard v. Filburn*, 317 U.S. 111, in which the Court sustained the validity of regulations limiting the quantity of wheat a farmer could grow for consumption on his own farm. An increase in the amount of wheat grown for home consumption obviously reduced the total demand for wheat sold in interstate commerce. Speaking for the Court, Mr. Justice Jackson said (*id.* at 127-128):

* * * That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

To the same effect, see *Polish National Alliance v. Labor Board*, 322 U.S. 643; *Labor Board v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 685, n. 14; *Labor Board v. Fainblatt*, 306 U.S. 601.

Fourth. Congress, in exercising its power to foster and promote interstate commerce, may deal incidentally with social or moral wrongs that affront the human personality in addition to their deleterious commercial consequences. That power was implicitly sustained a score of years ago in *Mitchell v. United States*, 313 U.S. 80, 94. See also *Henderson v. United States*, 339 U.S. 816. More recently, the exercise of an identical power in the case of restaurants operated by interstate motor carriers was sustained in *Boynnton v. Virginia*, 364 U.S. 454.

Nor is there anything unique in the treatment of racial discrimination. The Court has often sustained

the action of Congress in barring use of the channels of interstate commerce for the purpose of prostitution¹³ or gambling.¹⁴ Similarly, the constitutionality of legislation has been sustained where its purpose was to prevent the use of interstate commerce in carrying out criminal enterprises.¹⁵ Consumers and investors have been protected against fraud in the sale of products¹⁶ and securities.¹⁷ Time and time again, Congress has exercised the commerce power to eliminate discrimination of other kinds—discrimination against particular shippers¹⁸ or small sellers¹⁹ or members of labor unions.²⁰

Fifth. Neither the Ninth nor the Tenth Amendment to the Constitution operates as a limitation upon the powers granted to Congress in the main body of the Constitution. "[T]he Ninth Amendment * * * in insuring the maintenance of the rights retained by the people does not withdraw the rights which are

¹³ *Caminetti v. United States*, 242 U.S. 470; *Hoke v. United States*, 227 U.S. 308.

¹⁴ *Lottery Case*, 188 U.S. 321.

¹⁵ *Brooks v. United States*, 267 U.S. 432.

¹⁶ *Federal Trade Commission v. Mandel Bros.*, 359 U.S. 385; *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149; cf. *United States v. Sullivan*, 332 U.S. 689; *Hipolite Egg Co. v. United States*, 220 U.S. 45.

¹⁷ *Securities and Exchange Comm. v. Ralston Purina Co.*, 346 U.S. 119, 124; *A. C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38, 40.

¹⁸ *United States v. Baltimore & Ohio R.R. Co.*, 333 U.S. 169.

¹⁹ *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115.

²⁰ *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1; cf. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192; *Railway Employees Dep't. v. Hanson*, 351 U.S. 225.

expressly granted to the Federal Government.” *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 330-331. “From the beginning and for many years the [Tenth] amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. *Martin v. Hunter’s Lessee*, 1 Wheat. 304, 324, 325; *McCulloch v. Maryland*, *supra*, 405, 406.” *United States v. Darby*, 312 U.S. 100, 124. See, also, *United States v. Sprague*, 282 U.S. 716, 733; *Oklahoma v. Atkinson Co.*, 313 U.S. 508, 534; *Case v. Bowles*, 327 U.S. 92, 102. Since Congress had power under the commerce clause to enact the Civil Rights Act of 1964, the Act does not invade any rights reserved to the States or the people by the Ninth and Tenth Amendments.

So far as the power of Congress under the commerce clause is concerned, therefore, decision upon the constitutionality of Title II turns upon a single, simple question—Is there a rational basis for the legislative determination that discrimination on grounds of race or color in places of public accommodation—in particular, by hotels and motels receiving transient guests—burdens and obstructs interstate commerce? The evidence before Congress, we shall show, provides overwhelming support for an affirmative answer to that question.

Because this is the initial case involving Title II to come before the Court we deem it appropriate first

to discuss the evidence before Congress showing that racial discrimination in places of public accommodation covered by Title II so burdens and obstructs interstate commerce, as a matter of fact, as to be a truly national problem requiring federal action under the commerce clause. We then turn to the particular type of establishment involved in the instant case—a motel which solicits the patronage of interstate travelers and 75 percent of whose clientele are in fact from out-of-State—and show that, as applied to it and other hotels and motels, Title II does not go beyond the constitutional power to regulate interstate commerce.

A. DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION IMPOSES BURDENS UPON THE MOVEMENT OF INTERSTATE COMMERCE OF A KIND WHICH CONGRESS HAS POWER TO ELIMINATE

The outstanding fact of our national life during the past decade has been the endeavor to realize, as applied to Negroes and other minorities, the promise of the Declaration of Independence that all men are created equal. Racial segregation and discrimination in places of public accommodation, which are not confined to any section of the country, gave rise to a wide variety of protests including boycotts, picketing, mass demonstrations and other forms of economic warfare. As the Attorney General told the House Judiciary Subcommittee considering the civil rights bill, "Many of the demonstrations * * *, and the violence which has sometimes accompanied them, stem from attempts by Negro citizens to gain access to such

facilities as restaurants, lunch counters, places of amusements, stores, hotels, and the like."²¹

The problem has nationwide scope and is of almost incredible proportions. The Attorney General testified before the Senate Judiciary Committee that just between May 20 and July 31, 1963 (the date of his testimony) there were 639 demonstrations in 174 cities, 32 States, and the District of Columbia. Of these, 302 were concerned solely with discrimination in places of public accommodation.²² Assistant Attorney General Marshall wrote Senator Javits on April 14, 1964, furnishing later figures (110 Cong. Rec. 7980 (daily ed.)). From May 1963 to April 1964, a total of 2,422 racial demonstrations took place, of which 850 arose from disputes about discrimination in places of public accommodation. The Mayor of Atlanta, Georgia, testifying in favor of enactment, stated that "[f]ailure by Congress to take definite action at this time * * * would start the same old round of squabbles and demonstrations that we have had in the past."²³

The effect in many areas upon general business conditions and, therefore, on interstate commerce was

²¹ Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 88th Cong., 1st Sess., on Miscellaneous proposals regarding civil rights, Ser. No. 4, part II, p. 1373. These hearings are hereafter cited as "*House Subcomm. Hearings*."

²² Hearings before the Committee on the Judiciary, United States Senate, 88th Cong., 1st Sess., on S. 1731, p. 216.

²³ Report of the Committee on Commerce, United States Senate, on S. 1732, No. 872, 88th Cong., 2d Sess. (February 10, 1964), at 15, 21, quoting Mayor Ivan Allen, Jr. This report is hereafter cited as "*Senate Commerce Report*."

dramatic. The very purpose of boycotts and picketing, of course, is to discourage business. Under Secretary of Commerce Roosevelt testified that "[i]t is common knowledge that discrimination in public accommodations and demonstrations protesting such discrimination have had serious consequences for general business conditions in numerous cities in recent years." Hearings before the Committee on Commerce, United States Senate, 88th Cong., 1st Sess., on S. 1732, Part 2, Ser. 27, at 699.²⁴ The examples he described are impressive.

Retail sales in Birmingham were reported off 30 percent or more during the protest riots in the spring of 1963. Businessmen stated that there were more business failures than during the depression. Downtown stores privately reported that their sales in April of that year were off 40 to 50 percent. "They were hit first by a Negro boycott and then by a tense atmosphere that kept customers at home or in suburban shops. The Federal Reserve Bank showed department store sales in Birmingham in the four-week period ending May 18, 1963, down 15 percent over the same period in 1962. During the same period, department store sales were up in Atlanta, New Orleans, and Jacksonville. *Ibid.*

Other cities had similar experience. In Atlanta, Mr. Roosevelt testified, "after several months of intermittent demonstrations in 1960-1961, and a boycott sparked by student groups to remove racial barriers

²⁴ These hearings are hereafter cited as "*Senate Commerce Hearings.*"

in lunch counters and department store restaurants, merchants agreed that the Negro boycott of the downtown area was almost 100 percent effective." Department store sales for a one-week period in February 1961 were down 12 percent from the preceding year, according to the Federal Reserve Bank. *Senate Commerce Hearings*, at 699-700. In Savannah, lunch-counter discrimination in downtown stores finally ended following "a 15-month boycott of the stores by Negroes * * *." This boycott "cut retail sales as much as 50 percent in some places." In the fall of 1962 businessmen in Charlotte, North Carolina, "hit by drives for desegregation of public accommodations, estimated their business was cut by 20 to 40 percent." In Nashville, Tennessee, a boycott was maintained for seven weeks at 98 percent efficiency (*Senate Commerce Hearings*, at 700):

Negroes in Nashville spend an estimated \$7 million annually downtown and their absence had varying results. In one department store, they represented 12 to 15 percent of the business; in another department store, 5 percent. The transit company found its revenues dwindling seriously; the two newspapers found advertising linage figures failing.

"Variety stores," Mr. Roosevelt continued, "were hit particularly hard. With their lunch counters a sit-in target, even those who did venture downtown avoided the food counters, which sometimes account for as much as 50 percent of the gross profit." Even businessmen not involved in the sit-ins and which had

reputations of good service to Negroes found business dropping." *Ibid.*

It is evident that such a general downturn in retail business must, if left unchecked, result in serious disruption in the flow of goods across State lines; if retail stores cannot sell, they in turn will not buy from wholesalers, who in turn must necessarily reduce their out-of-State purchases. In a highly interdependent economy, as Congressmen McCulloch, Lindsay, and other Republican members of the House Judicial Committee observed, "a local disturbance can affect the commerce of an entire State, region, and the country."²⁵ Or, as a "top retail executive" said, "[t]his thing has frightening ramifications. It is more serious than people realize. It has now become an economic situation affecting an entire community, the whole city, and the whole country."²⁶

Less obvious, but no less important, is the impact of racial disputes and civil unrest upon the flow of investment. Congress was told of companies which had decided, because of such disputes, not to open plants and offices in Birmingham and Montgomery.²⁷

²⁵ "Additional Views" of Congressmen McCulloch, Lindsay, and other Republican committee members, filed in support of the Report of the House Judiciary Committee, 88th Cong., 1st Sess., No. 914, Part 2, on H.R. 7152 (December 2, 1963) at 12. This document is hereafter cited as "*Additional Views*."

²⁶ Report of the Legislative Reference Service, Library of Congress, to the Chairman of the Senate Commerce Committee, "An Episodic Account of Economic Effect of Segregation and Resistance to Segregation in the South," *Senate Commerce Hearings*, at 1384.

²⁷ *Id.* at 1385.

Congressman McCulloch, summarizing the evidence, stated: The "segregation of public accommodations and other sources of racial unrest in Birmingham, Ala., have induced many businesses to reconsider their plans to move into or to expand their existing operations in the area." *Additional Views*, at 12.

The story had been the same in Little Rock. As Under Secretary Roosevelt testified (*Senate Commerce Hearings*, at 699):

In the 2 years before the crisis over schools and desegregation of public accommodations erupted into violence in Little Rock in September 1957, industrial investments totaled \$248 million in Arkansas. During the period, Little Rock alone gained 10 new plants, worth \$3.4 million, which added 1,072 jobs in the city. In the 2 years after the turbulence which brought Federal troops to the city, not a single company employing more than 15 workers moved into the Little Rock area. Industrial investments in the State as a whole dropped to \$190 million from \$248 million of the 2 years before desegregation.

We have no need to argue that the impact upon interstate commerce of these widespread disputes, would alone support federal legislation outlawing racial discrimination, without a specific showing of a relationship between a particular establishment and the movement of goods in interstate commerce. No such question is presented here because, except in the case of hotels and motels, Congress covered only establishments each of which could be shown to have

its own individual link to interstate commerce. In the case of hotels and motels that link, as we show in the next subdivision of our argument, follows automatically from their entertainment of transient guests. But the disputes and their impact upon interstate commerce do show that the problem is not only social and moral—but national and commercial. The importance of any individual establishment and of its link to commerce must be judged not as an isolated phenomenon but as part of a complex and interrelated national problem having the major impact upon interstate commerce described above. Cf. *Wickard v. Filburn*, 317 U.S. 111.

Settled precedents establish the constitutional sufficiency of the individual links to commerce required by Section 201(c) before Section 201(a) becomes applicable to any place of public accommodation.

Restaurants, lunch counters, etc. In the case of an establishment serving food or selling gasoline, it must appear that "a substantial portion of the food which it serves or * * * products which it sells, has moved in commerce." (Section 201(c)(2).) Current history makes all too clear the danger that racial segregation or discrimination in such a place may lead to picketing or other demonstrations. That dispute would, in turn, create danger of closing the establishment or reducing its patronage with a consequent interruption in the flow of goods from other States. The situation is the same in principle as the countless cases in which the courts have sustained the application of the National Labor Relations Act to establishments receiving

goods in interstate commerce on the ground that a labor dispute at such an establishment might result in a strike or other concerted activity that would curtail the interstate flow of goods.

The point is illustrated by this Court's decision in *Labor Board v. Reliance Fuel Corp.*, *supra*, which is merely the latest in a long series of cases basing federal power over the labor relations of a retail business on the threat to the market for interstate goods caused by labor disputes which involve businesses that purchase goods from other States. See, e.g., *Labor Board v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 683-684; *May Department Stores Co. v. Labor Board*, 326 U.S. 376 (retail store); *J. L. Brandeis & Sons v. Labor Board*, 142 F. 2d 977 (C.A. 8), certiorari denied, 323 U.S. 751 (retail store); *McLeod v. Bakery Drivers Local*, 204 F. Supp. 288 (E.D. N.Y.) (bakery); *Retail Fruit & Vegetable Union v. Labor Board*, 249 F. 2d 591 (C.A. 9) (retail store); *Int'l Brotherhood v. Labor Board*, 341 U.S. 694 (construction project); *Local 74 v. Labor Board*, 341 U.S. 707 (store, dwelling renovation). As the court of appeals said in *J. L. Brandeis & Sons v. Labor Board* (142 F. 2d at 980-981) *supra*:

It is urged, also, that when shipment of out-of-state merchandise come to rest in the store interstate commerce ends and what may occur thereafter does not directly affect it. If when selling at the store stops purchasing outside the state also stops, it is fair to say that the latter is the effect of the former * * *. In determining its own jurisdiction the Board properly considered the possible effect of labor strife in

the store upon the flow of merchandise purchased and shipped from outside the state to maintain the constantly diminishing stock offered for sale at retail.

In particular, the Labor Board has on many occasions regulated labor relations in restaurants, on the theory that disputes in restaurants tend to diminish the quantity of food and other products from other States purchased by the restaurant to serve its customers. See, *e.g.*, *Labor Board v. Morrison Cafeteria Co. of Little Rock*, 311 F. 2d 534 (C.A. 8); *Labor Board v. Local Joint Board*, 301 F. 2d 149 (C.A. 9); *Labor Board v. Childs Co.*, 195 F. 2d 617 (C.A. 2); *Labor Board v. Laundry Drivers Local*, 262 F. 2d 617 (C.A. 9); *Labor Board v. Gene Compton's Corp.*, 262 F. 2d 653 (C.A. 9); *Labor Board v. Howard Johnson Co.*, 317 F. 2d 1 (C.A. 3), certiorari denied, 375 U.S. 920; *Kennedy v. Los Angeles Joint Board*, 192 F. Supp. 339 (S.D. Cal.).²⁸ These cases provide conclusive authority to sustain the applicability of the Civil Rights Act of 1964 to a restaurant (and, by close analogy, to a gasoline station) which obtains from the channels of interstate commerce a significant portion of the goods it uses or sells.

The reduction in the business—and therefore in the purchase of goods from other States—of a restaurant or a gasoline station which is involved in a racial

²⁸ See also, *Brennan's French Restaurant*, 129 N.L.R.B. 52; *Stork Restaurant, Inc.*, 130 N.L.R.B. 543; *Joe Hunt's Restaurant*, 138 N.L.R.B. 470; *Childs Co.*, 88 N.L.R.B. 720; *Childs Co.*, 93 N.L.R.B. 281; *Bolton & Hay*, 100 N.L.R.B. 361; *The Stouffer Corp.*, 101 N.L.R.B. 1331; *Mil-Bur, Inc.*, 94 N.L.R.B. 1161.

dispute is not the only, or even the most direct, effect on interstate commerce caused by racial discrimination in such establishments. A second and still more direct link between such discrimination and interstate commerce is the reduction in the number of potential customers caused by the discouragement of Negro patronage; this in turn reduces the quantity of goods purchased through interstate channels. As the Attorney General testified (*Senate Commerce Hearings*, at 18-19): "Discrimination by retail stores which deal in goods obtained through interstate commerce puts an artificial restriction on the market and interferes with the natural flow of merchandise."

It is clear that the aggregate effect of racial discrimination by restaurants (and gasoline stations) is substantially to restrict the market for food and other goods. Indeed, that is simply a truism. Not only is the market restricted because established businesses sell less, but also because many new businesses are doubtless not opened because of the narrowed market resulting from the exclusionary practices. This restriction on the market, in turn, retards the flow of goods in interstate channels. Congress plainly has power to legislate this result.

The testimony of Under Secretary Roosevelt is revealing with respect to the effect of policies of racial exclusion in retail establishments, including restaurants, on the scope of the market for food and other products sold by such places. His testimony was that Negroes spend less money per capita, *after discounting income differences*, than do whites in restaurants,

theaters, and the like, and that the disparity is especially aggravated in the South where such exclusionary practices are widespread. He attributed this to racial discrimination. *Senate Commerce Hearings*, at 695.

For example, Mr. Roosevelt testified that "Negroes in large northern cities spend more than southern Negroes of the same income class in all of these expenditure categories [*i.e.*, restaurants, theaters, recreational facilities, hotels, motels] * * *, even though white families in northern cities spend less than similar families in southern cities." "In the same income group," he said, "northern Negroes spend more than northern whites for [theaters and recreation], but southern Negroes spend less than southern whites and northern Negroes. Negroes in both the North and South spend less on 'Food eaten away from home' than white people in the same income groups, but the difference is much greater in the South." *Ibid.*²⁹

The power of Congress to prohibit the widespread practice of discrimination against Negro customers by restaurants and gasoline stations is amply sustained by the Sherman Act precedents forbidding similarly arbitrary, though far less sweeping, restrictions on the market for goods and services. Even a limited group of sellers, for example, cannot agree not to deal with any particular class of customers. See, *e.g.*, *United States v. First National Pictures Inc.*, 282 U.S. 44; *Fashion Originators' Guild of America*

²⁹ The statistics furnished Congress by the Commerce Department are set out in Appendix B, *infra*, p. 70.

v. *Federal Trade Commission*, 312 U.S. 457. Nor can they agree to deal with their customers only on common terms. Even though customers may be able to obtain the goods from other sellers, Congress can reach the restraint because it "interferes with the natural flow of interstate commerce." *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 213. For the same reason, a widespread refusal of retail establishments to sell to Negro customers interferes with the flow of interstate commerce, even though it may remain open to these customers to patronize other sellers. Cf. *Goldman Theaters Inc. v. Loews Inc.*, 150 F. 2d 738 (C.A. 3), certiorari denied, 334 U.S. 811; *Labor Board v. Bradford Dyeing Assn.*, 310 U.S. 318, 326.

Theatres and other exhibitions. Sections 201 (b) and (c), read together, prohibit racial discrimination or segregation in "any motion picture house, theatre, concert hall, sports arena, stadium or other place of exhibition or entertainment" if it "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in [interstate] commerce." Proof of the latter fact links such an establishment to commerce in two ways, each of which is constitutionally sufficient to show that the prohibition against racial segregation or discrimination is, in truth, a measure fostering and promoting interstate commerce.

First, continued discrimination would create a risk of picketing and similar demonstrations threatening to block the flow of films into the State or the interstate travel of performers. In this respect, the factual link between these establishments and interstate

commerce, and also the principles sustaining their coverage, is the same as in the case of restaurants and gasoline stations. Here, again, decisions under the National Labor Relations Act provide exact precedents. *National Labor Relations Board v. Combined Sentry Theatres, Inc.*, 278 F. 2d 306 (C.A. 2). See, also, *Labor Board v. Gamble Enterprises, Inc.*, 345 U.S. 117; *Balaban & Katz*, 87 NLRB 1071; *Fox Midwest Amusement Corp.*, 98 NLRB 699.

Second, discriminatory practices in places of entertainment artificially restrict the demand for films and performers from out-of-State sources, and thus lessen the flow of commerce. The Senate Committee on Commerce reported (S. Rep. 872, 88th Cong., 2d Sess., p. 20)—

discriminatory practices in places of entertainment or amusement not only artificially restrict the demand for entertainment

but that a number of orchestras and companies of actors were unwilling to visit cities in which theatre facilities were segregated. The Committee cited specifically the refusal of the New York Metropolitan Opera Company to go to Birmingham, where it had previously had an annual season, and the rules of Actor's Equity and American Guild of Variety Artists sanctioning the refusal of their members to perform in places where the audience was segregated. *Ibid.*

The power of Congress to deal with artificial obstructions affecting the interstate movement of films and entertainers has been recognized in a variety of decisions under the Sherman Act. In *Interstate Circuit v. United States*, 306 U.S. 208, 219, the Court

noted that the effect of a conspiracy among distributors imposing restraints upon the exhibition of motion pictures was to cause some exhibitors to "increase their admission price, * * * and to abandon double billing of all such pictures, and causing the other subsequent-run exhibitors, who were either unable or unwilling to accept the restrictions, to be deprived of any opportunity to exhibit the restricted pictures, which were the best and most popular of all new feature pictures * * *." In turn, "the effect of the restrictions upon 'low-income members of the community' patronizing the theatres of these exhibitors was to withhold from them altogether the 'best entertainment furnished by the motion picture industry' * * *." The widespread exclusion of Negroes from motion picture theatres and similar places of entertainment has the same effect upon interstate commerce and upon the public interest. For other cases sustaining the power of Congress over the entertainment industry, including the exhibitors, see *Interstate Circuit v. United States*, 306 U.S. 208; *White Bear Theatre v. State Theatre Corp.*, 129 F. 2d 600 (C.A. 8); *Youngclaus v. Omaha Film Board*, 60 F. 2d 538 (D. Neb.); *IPC Distributors v. Chicago Union*, 132 F. Supp. 294 (C.A.D.C.), or stage attractions, *United States v. Shubert*, 348 U.S. 222, or professional boxing matches, *United States v. I.B.C.*, 348 U.S. 236, or football games, *Radovich v. Nat'l Football League*, 352 U.S. 445, although these activities are ordinarily thought of as "local affair[s]." *United States v. I.B.C.*, *supra* at 241.

Related Establishments. Sections 201(a) and (b) extend the guarantee of equal service and accommodations to all establishments which either (i) are physically within the premises of a covered establishment or (ii) include within their premises a covered establishment and hold themselves out as serving its patrons. There is no need to discuss, in the instant case, the exact scope of these provisions. Both arise from the departmentalization of many enterprises, especially department stores, and of leasing to different operators portions of a single physical establishment which operates largely as a functional unit and serves much the same clientele. Thus, the news stand or flower shop in a covered hotel, from the standpoint of those staying at the hotel, is in substance part of the one enterprise. The two are also intimately associated from the standpoint of both the hotel management and the operators of the news stand or flower shop. Similarly, the ownership of a restaurant or lunch counter located in a bowling alley, but the operators present them as a functional unit and they serve a common clientele which rarely distinguishes the management of one from the management of the other.

The constitutional basis for the coverage of such "related establishments" is the same as that which sustains the federal regulation of the establishment giving rise to the expanded coverage. No further problems would seem to be involved. Congress has ample power to take account of the physical and functional interrelationships, especially where the prac-

tices of one are bound to affect the patronage and practices of the other. The drawing of such lines is an essential part of the legislative function. Cf. *Boynton v. Virginia*, 364 U.S. 454; *Curran v. Wallace*, 306 U.S. 1; *United States v. Darby*, 312 U.S. 100, 121. See, also, *Purity Extract Co. v. Lynch*, 226 U.S. 192; *Everard's Breweries v. Day*, 265 U.S. 545.

It may be argued that Congress could have found other methods of dealing with the obstructions to interstate commerce such as outlawing the demonstrations resulting from racial discrimination. How an obstruction to commerce shall be removed—what means are “necessary and proper” to remove it—is a question for legislative discretion, provided that the means chosen are reasonably adapted to the permissible end. Here, Congress determined to end the offensive and immoral practices of racism in places of public accommodations having a substantial relation to interstate commerce. Its action is consonant with our entire constitutional history since 1865. Attempts to suppress the aspirations of the victims of discrimination would have been an affront to civilization. It is an understatement to say that the choice was reasonable, although the Constitution requires no more.

B. DISCRIMINATION IN HOTELS AND MOTELS SERVING TRANSIENT GUESTS IMPOSES BURDENS UPON INTERSTATE TRAVEL OF A KIND WHICH CONGRESS HAS POWER TO ELIMINATE

1. Racial discrimination in hotels and motels, in fact, burdens interstate travel

Congress had before it overwhelming evidence that discrimination by hotels and motels impedes interstate

travel by Negroes, and interstate travel is, of course, a form of interstate commerce. *Edwards v. California*, 314 U.S. 160.³⁰ The plain truth is that in many places lodging is simply not available to Negro travelers. For example, a report of the Senate Commerce Committee describes evidence that "a Negro traveling by car from Washington, D.C., to New Orleans must travel an average of 174 miles between establishments that will provide him with suitable lodging."³¹ *Senate Commerce Report*, at 18. Even then he has little assurance of finding lodging: "Many of these establishments are small and there is often no vacancy for the traveler who seeks accommodations in the latter part of the day." *Id.* at 18.

Testimony presented to the Senate Commerce Committee by Under-Secretary of Commerce Roosevelt elaborates on the point. For a trip between Washington, D.C., and Miami, the average distance between accommodations of "reasonable" quality which were open to Negroes was found to be 141 miles, or several hours of driving. Moreover, since the motels and hotels that will take Negroes have, on an average, only about fifteen units, it is "quite obvious that a traveling family might find that they had finally reached one of the accommodations but only to find

³⁰ See n. 12, p. 18, *supra*.

³¹ This information had been originally prepared by the publisher of a special guidebook for Negroes, and presented to the Committee by Under-Secretary of Commerce Franklin D. Roosevelt, Jr. As the Under-Secretary remarked, the "very existence" of such a special guidebook is "dramatic testimony to the difficulties" a Negro traveler encounters. *Senate Commerce Hearings*, at 693-694.

no vacancy or that it was filled up." Summarizing the evidence as to the availability of lodging places along three representative routes (Washington, D.C., to Florida, Chicago to New Orleans, and Washington, D.C., to New Orleans), the Under Secretary said that Negroes "would have an extremely slender choice in attempting to find overnight accommodations in hotels and motels serving white travelers along the same routes." *Senate Commerce Hearings*, at 692-694.²²

The exclusionary practices were not limited to any one area. As the Under Secretary stated, "[t]here is no question that this discrimination in the North still exists to a large degree," and in the West and Midwest as well. *Id.* at 735. See, also, testimony of Mr. Roy Wilkins, Executive Secretary of the National Association for the Advancement of Colored People, that a Negro encountered almost the same difficulty finding lodging in a small town in Iowa as in Alabama. *Senate Commerce Hearings*, at 657.

Other testimony before Congress showed that the unavailability of lodging facilities had both a qualitative and a quantitative effect upon interstate travel by Negroes. The quality—that is, the pleasure, convenience, and ease—of travel by Negro citizens was

²² Referring to the average distance between suitable accommodations which the Committee later noted, the Under Secretary testified that "even if we cut in half the average of 141 miles on the Washington to Miami trip, or the 174 miles on the New Orleans drive, we would still have considerable distances over which Negroes would typically have to drive before they could expect to find reasonable accommodations open to them on the same basis as white travelers." *Senate Commerce Hearings*, at 694-695.

obviously impaired in a serious manner by their inability to find suitable overnight accommodations while *en route* from State to State. Quoting the testimony of Mr. Roy Wilkins, the Senate Commerce Committee stated (*Senate Commerce Report* at 15-16):

For millions of Americans this [July 1963] is vacation time. Swarms of families load their automobiles and trek across the country. I invite the members of this committee to imagine themselves darker in color and to plan an auto trip from Norfolk, Va., to the gulf coast of Mississippi, say, to Biloxi. Or one from Terre Haute, Ind., to Charleston, S.C., or from Jacksonville, Fla., to Tyler, Texas.

How far do you drive each day? Where and under what conditions can you and your family eat? Where can they use a rest room? Can you stop driving after a reasonable day behind the wheel or must you drive until you reach a city where relatives or friends will accommodate you and yours for the night? Will your children be denied a soft drink or an ice cream cone because they are not white?³³

Describing the typical Negro odyssey through the Southern part of the United States, Mr. Wilkins said (*Senate Commerce Hearings*, at 657):

Where you travel through what we might call hostile territory you take your chances. You

³³ Senator Javits, who appeared as a witness before the Senate Commerce Committee, quoted an incident from an issue of *Hotel Monthly* magazine concerning a wealthy Negro traveler, who, with his wife and children, was unable to find any hotel or motel accommodation in St. Petersburg and consequently had to sleep in his automobile with his entire family *Senate Commerce Hearings*, at 257-258.

drive and you drive and you drive. You don't stop where there is a vacancy sign out at a motel at 4 o'clock in the afternoon and rest yourself; you keep on driving until the next city or the next town where you know somebody or they know somebody who knows somebody who can take care of you."

Attorney General Kennedy testified as follows:

And in addition to the insult, consider the physical and financial inconvenience suffered by Negroes through such discrimination.

* * * * *

* * * If he makes reservations without first determining whether or not the establishment will accept people of his race, he may well find on his arrival that the reservation will not be honored—or that it will somehow have been mislaid. His alternative is to subject himself and his family to the humiliation of rejection at one establishment after another—until, as likely as not, he is forced to accept accommodation of inferior quality, far removed from his route of travel."

As Senator Humphrey, the principal majority spokesman for the civil rights bill, described the problems faced by Negroes contemplating an interstate journey, "[t]hey must draw up travel plans much as a general advancing across hostile territory would

"Referring to the problems Negroes encounter on trips, Mr. Wilkins said, "[t]he answer is that you don't figure them out. You just live uncomfortably, from day to day." *Senate Commerce Hearings*, at 657.

"*Senate Commerce Hearings*, at 18. See also the Attorney General's similar testimony at hearings before Subcommittee No. 5 of the House Committee on the Judiciary. *House Subcomm. Hearings*, at 1374.

establish his logistical support." 110 Cong. Rec. 6311 (daily ed.). Or, as another witness put the situation, "[f]or the white man traveling from State to State, the road is a series of familiar landmarks and frequently his most difficult problem is to make a choice among the array of establishments offering him food, lodging, and respite," but for the Negro traveler "the road may be more like a desert and each inviting sign a mirage or, worse yet, a humiliating rebuff to him, his family, or companions." ³⁶

Aside from the "strain of traveling long distances without respite, the nagging uncertainty of locating a decent place to eat or sleep," ³⁷ and the concomitant humiliation and embarrassment, there were other practical inconveniences which resulted. A Negro might be forced to look for lodging at places far removed from his route of travel, or he might be compelled to follow a route less direct, desirable, or convenient than he would otherwise take. ³⁸ He would often be obliged to accept inferior accommodations. ³⁹ In short, as the

³⁶ Erwin Griswold, member of the United States Commission on Civil Rights, and Dean of the Harvard Law School, *Senate Commerce Hearings*, at 770.

³⁷ "Additional Views" at 9. See also, *Senate Commerce Hearings*, at 694-695 (testimony of Under Secretary of Commerce Roosevelt that Negroes frequently must drive longer hours than the National Safety Council recommends because of unavailability of lodging accommodations).

³⁸ Mr. Roy Wilkins, testifying before the Senate Commerce Committee, *Senate Commerce Hearings*, at 657.

³⁹ See the testimony of Attorney General Kennedy, *Senate Commerce Hearings*, at 18. See also his testimony before the House Judiciary Subcommittee, *House Subcomm. Hearings*, at 1374.

Senate committee found, "[d]iscrimination or segregation by establishments dealing with the interstate traveler subjects members of minority groups to hardship and inconvenience as well as humiliation * * *."

Senate Commerce Report, at 17.

It is hardly surprising that the number of persons who engaged in interstate travel was diminished as a result of these conditions. The Senate Commerce Committee found that the racial discrimination and exclusion to which Negro travelers were subjected "seriously decreases all forms of travel by those subject to such discrimination." *Senate Commerce Report*, at 17-18. It noted that "a family is not encouraged to travel along a route or into an area where, because of the color of their skin, they will be denied suitable lodging or other facilities." *Ibid.*

As the head of the Civil Rights Division, Department of Justice, explained the matter, when "[a] traveler seeking a place to sleep or to eat * * * is turned away by one establishment after another solely because of his color" he "understandably becomes exasperated"; such discrimination, which "burdens Negro interstate travelers," thereby "inhibits interstate travel." *Senate Commerce Hearings*, at 206, 207 (testimony of Assistant Attorney General Burke Marshall). The ranking Republican member of the House Judiciary Committee and principal House Republican spokesman for the bill, Congressman McCulloch of Ohio, quoted Mr. Roy Wilkins to make the same point (*Additional Views*, at 9):

As was so aptly stated, "some of them [Negroes] don't go [on interstate journeys]. The

strain of traveling long distances without respite, the nagging uncertainty of locating a decent place to eat or sleep, or the fear of finding oneself on a lonely road at night with car trouble and no place to turn for assistance has forced innumerable families and individuals to stay at home."⁴⁰

Under Secretary of Commerce Roosevelt, whose Department had studied the effect of discrimination on commerce, concluded that "interstate travel as far as the Negro community is concerned is very heavily burdened by the segregation of public accommodations." Elimination of these racial practices would, he concluded, result in "tourism and interstate travel greatly increased." *Senate Commerce Hearings*, at 744.⁴¹ That was also the conclusion of N. E. Halaby, Administrator of the Federal Aviation Agency, who wrote to Senator Magnuson, Chairman of the Senate Commerce Committee, that ending discrimination in

⁴⁰ See also Senator Humphrey's statement that "because of the lack of such facilities some truck companies hesitate to use Negro drivers in certain areas of the country" (110 Cong. Rec. 6315 (daily ed.)), and *id.* at 1478 (Congressman Lindsay).

⁴¹ Mr. Roosevelt said that the evidence showed Negroes "use their cars about 40 to 50 percent less than whites do of similar comparable economic levels. I attribute this lower use to the fact that Negroes shy away from taking long trips where they may have, in the case of going from here to Miami, an average of 145 miles between places where they can stop to sleep." *Ibid.*

He also explained that "[s]ome well-to-do [Negro] individuals with enough money for a midwinter vacation, find it far more pleasurable to go abroad than to risk the insults and rejections which they are likely to face in many of the Florida hotels and luxury resorts. In fact, there is a steady stream of such travelers to the British West Indies." *Id.* at 695.

food and lodging "is essential if air commerce is to reach its fullest development." It was the Administrator's "belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations." "

The hearings also showed that the selection of sites for conventions and the volume of travel to attend them are strongly affected by the racial practices of hotels and motels. *Senate Commerce Report*, at 17. The Committee noted, for example, that Dallas had greatly benefited because its hotels had integrated, and that "[w]ithin 1 day after 14 Atlanta hotels recently announced they would accept Negro convention guests, the Atlanta Convention Bureau had received commitments from three organizations including 3,000 delegates that would not have otherwise visited Atlanta." *Ibid.* As Congressman McCulloch said, "[p]lanned conventions in many cities are canceled, while others are automatically scheduled elsewhere because of segregation." *Additional Views*, at 12. Under Secretary Roosevelt noted that an American Legion convention of as many as 50,000 persons had been shifted from New Orleans because nonsegregated facilities could not be assured. *Senate Commerce Hearings*, at 696-697.

2. Congress has power to eliminate practices in hotels and motels that burden interstate travel

The factual connection between racial discrimination and interstate travel is sufficient, under the principles

" *Senate Commerce Hearings* at 12-13.

already outlined, to establish the power of Congress to require hotels and motels to provide equal accommodations without regard to race or color. Both Congress and this Court have previously recognized, and have dealt with, the harmful effects of racial discrimination upon interstate travel. To facilitate and encourage interstate commerce, Congress has prohibited rail, motor, and air carriers from subjecting "any particular person * * * to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."⁴ These statutes forbid the carrier to make any distinction among passengers which would inconvenience the transit of any traveler or impose upon him burdens more onerous than are imposed upon other passengers. They require carriers to provide Negro passengers the same facilities and conveniences as are furnished to white travelers. See *Mitchell v. United States*, 313 U.S. 80 (Negro passenger denied a Pullman seat); *Henderson v. United States*, 339 U.S. 816 (dining car segregation).⁵ The prohibition against discrimination is not limited to the physical inconveniences of unequal facilities but extends to the humiliation inflicted by segregation. *Boynton v. Virginia*, 364 U.S. 454. Indeed, this Court has held that the burden and inconvenience which racial segregation imposes on interstate travel is so substantial that, even without regard to federal statutes, a State

⁴ See 49 U.S.C. 3(1), 816(d) and 1374(b).

⁵ Similarly, refusal to provide air carrier space on account of race has been held to violate the Air Carrier Act. *Fitzgerald v. Pan American Airways*, 229 F. 2d 499 (C.A. 2).

requirement of segregation on interstate buses is invalid under the commerce clause. *Morgan v. Virginia*, 328 U.S. 373.

This power of regulation is not limited to the carriers furnishing the actual transportation across State lines. Interstate travel depends almost as much upon the availability of food and lodging for transients as upon transportation itself. Thus, in *Boynton v. Virginia*, 364 U.S. 454, this Court held that the Interstate Commerce Act operated to prohibit segregation in eating facilities in a bus terminal, although the facilities were neither owned nor controlled by the carrier. Recent decisions under the same Act hold that interstate motor carriers may not make use of any terminal in which racial discrimination is practiced. See *Georgia v. United States*, 201 F. Supp. 813 (N.D. Ga.), affirmed, 371 U.S. 9; *United States v. Lassiter*, 203 F. Supp. 20 (W.D. La.), affirmed, 371 U.S. 10.⁴⁵ Indeed, racial segregation in interstate

⁴⁵ See also, *United States v. City of Shreveport*, 210 F. Supp. 708 (W.D. La.), affirmed, 316 F. 2d 928 (No. 2) (C.A. 5); *United States v. City of Jackson*, 318 F. 2d 1 (C.A. 5). This prohibition was pursuant to a regulation of the Interstate Commerce Commission issued in 1961, 49 C.F.R. 180a, 26 Fed. Reg. 9166. See 86 M.C.C. 743. The Commission had earlier decided that rail terminals may not be segregated, *N.A.A.C.P. v. St. Louis-San Francisco Ry. Co.*, 297 I.C.C. 335, and the courts, applying 49 U.S.C. 3(1), have enjoined such practices. *United States v. City of Jackson*, *supra*; *United States v. Lassiter*, *supra*. Similarly, the Federal Aviation Act, 49 U.S.C. 1374(b), has been held to ban air terminal segregation. *City of Shreveport v. United States*, 210 F. Supp. 36 (W.D. La.), affirmed, 316 F. 2d 928 (No. 1) (C.A. 5); *United States v. City of Montgomery*, 210 F. Supp. 590 (M.D. Ala.).

terminal facilities is thought to interfere with interstate travel so substantially that the commerce clause itself forbids any State law requiring such segregation, under the principle announced in *Morgan v. Virginia*, *supra*. See *United States v. City of Jackson*, *United States v. City of Montgomery*, *United States v. Lassiter*, and both *Shreveport* cases *supra*, p. 48 and n. 45. See also, *Lewis v. Greyhound*, 199 F. Supp. 210, 214 (M.D. Ala.).⁴⁶

The provisions of the Civil Rights Act of 1964 forbidding racial discrimination in hotels and motels which receive transient guests are indistinguishable in purpose and justification from the provisions of the Interstate Commerce Act which this Court has held can be constitutionally applied to terminal facilities. Adequate motel and hotel accommodations are

⁴⁶ In light of these decisions it is evident that appellant's reliance upon *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845 (C.A. 4), is misplaced. The court there dismissed a claim based upon refusal of a roadside restaurant to serve a Negro, holding that neither the Interstate Commerce Act nor the commerce clause *standing alone* forbade such a practice. This was merely a holding that the then-existing statutes reached only carriers and terminals and that the commerce clause itself, without Congressional action, did not apply to limit the action of private parties. The court was not called upon to decide, and did not decide, whether Congress had the power to reach such an establishment in the exercise of its commerce power. This is made clear in a subsequent case between the same parties, *Williams v. Howard Johnson's Restaurant*, 323 F. 2d 102 (C.A. 4), decided prior to passage of the 1964 Act, where the same Court observed that the enactment of legislation prohibiting discrimination by such a restaurant "might be entirely appropriate for the State or for the Congress. * * *," 323 F. 2d at 106.

no less essential to interstate travelers than adequate restaurants. It has been said that "interstate passengers have to eat" (*Boynton v. Virginia*, 364 U.S. at 463); it need hardly be added that they also have to sleep. In *Boynton*, regulation under the commerce power was particularly appropriate because the terminal restaurant "was primarily or partly for the service of the passengers of the Trailways bus" and was "geared to the service of bus companies and their passengers, even though local people who might happen to come into the terminal or its restaurant might also be accommodated" (*id.* at 461, 462). Similarly, hotels and motels are in business largely, if not exclusively, to satisfy the needs of travelers. Seventy-five percent of appellant's patrons are travelers from outside Georgia.

The effect of inadequate transient accommodations upon interstate travel has already been held sufficient to sustain federal regulation of the labor relations of hotels and motels. Discrimination by an employer against a hotel employee on the basis of union membership can be prohibited by federal law because it may lead to work stoppages at the hotel, and because this in turn (despite the existence of competing hotels) may deter interstate travel. Indeed in *Hotel Employees Local No. 255 v. Leedom*, 358 U.S. 99 (1958), this Court ruled that the Labor Board could not lawfully follow a general policy of refusing to exercise its jurisdiction over unfair labor practices and other labor disputes in hotels and motels. Since 1958, the Board has repeatedly proceeded against

such establishments despite arguments that it lacked constitutional authority.⁴⁷ While the Board's jurisdiction is established if even a small amount of a hotel's purchases are made in interstate channels (see, e.g., *Labor Board v. Baker Hotel*, 311 F. 2d 528, 529 (C.A. 5)—on the theory that a labor dispute in a hotel might disrupt the flow of goods in commerce—hotels are also regulated by the Board on the more obvious ground that a labor dispute in a hotel or motel would directly affect interstate travel. Thus in *Labor Board v. Holiday Hotel Management Co., Inc.*, 311 F. 2d 380 (C.A. 10), the court of appeals, rejecting a challenge to the agency's authority, stated (p. 381):

In the case at bar jurisdiction rests on a more firm basis because *the relationship to interstate commerce is direct rather than indirect*. The respondent here received more than \$1,500 worth of goods, equipment, and supplies which were shipped directly to it from out-of-State points. While this amount is not impressive, it must be considered together with the obvious fact that "hotels which serve a transient trade play an important role in furthering travel and in fostering commercial relation-

⁴⁷ See, e.g., *Labor Board v. Citizens Hotel Co.*, 313 F. 2d 708 (C.A. 5); *Labor Board v. Baker Hotel*, 311 F. 2d 528 (C.A. 5); *Labor Board v. Holiday Hotel Management Co., Inc.*, 311 F. 2d 380 (C.A. 10); *Samoff v. Hotel, Motel, & Club Employees Union*, 199 F. Supp. 265 (E.D. Pa.); *Sperry v. Local Joint Board*, 216 F. Supp. 263 (W.D. Mo.), affirmed, 323 F. 2d 75 (C.A. 8); *Floridan Hotel of Tampa, Inc.*, 124 N.L.R.B. 261; *Atlanta Biltmore Hotel Corp.*, 128 N.L.R.B. 364; *Tulsa Hotel Management Corp.*, 135 N.L.R.B. 968; *Trade Winds Motor Hotel*, 140 N.L.R.B. 567; *Canal St. Hotel*, 127 N.L.R.B. 880; *Lamar Hotel*, 127 N.L.R.B. 885; *Southwest Hotels*, 126 N.L.R.B. 1151.

ships between the inhabitants of the several states.”⁴⁰ Labor disputes which interfere with the operations of these hotels affect the “operations of the various media of passenger transportation”⁴¹ and if left unchecked would spread to other hotels in the same area with consequent far-reaching harmful effects on interstate commerce.

Similarly, in *Floridan Hotel of Tampa, Inc.*, 124 N.L.R.B. 261, the Board, asserting its jurisdiction, noted that the hotel “provides necessary services to members of the traveling public who travel in interstate commerce,” and that “[w]hether the Board has jurisdiction * * * is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board in this case.” The “primary function” of the \$2,400,000,000 hotel industry being “to furnish lodging facilities * * * and other services to the traveling public,” it followed, in the Board’s view, that “the operations of the industry facilitate the movement of persons in this country * * *,” thus subjecting the hotel to Board regulation. 124 N.L.R.B. at 262-263. To the same effect, see *Atlanta Biltmore Hotel Corp.*, 128 N.L.R.B. 364, 367; *Southwest Hotels, Inc.*, 126 N.L.R.B. 1151, 1154.

The decisions applying the commerce power specifically to hotels and motels amply demonstrate that there is no novelty, from a constitutional standpoint,

⁴⁰ Quoting *Southwest Hotels, Inc.*, 126 N.L.R.B. 1151, 1154.

⁴¹ Quoting *Floridan Hotel of Tampa, Inc.*, 124 N.L.R.B. 261.

in the present legislation. The evidence we have summarized is underscored by the "common-sense view that hotels which serve a transient trade play an important role in furthering travel and in fostering commercial relationships between the inhabitants of the several states." *Southwest Hotels, Inc.*, 126 N.L.R.B. 1151, 1154.

3. *Congress may constitutionally extend its regulation of hotels and motels to the prohibition of discrimination against all guests whether or not traveling in interstate commerce*

It is no objection to the constitutionality of sections 201 (b)(1) and (c)(1) of the Act that they prohibit discrimination by motels against all travelers, whether they be on interstate or intrastate journeys. It has long been settled that Congress may regulate intrastate activity where such regulation is necessary to effectuate fully its regulation of interstate commerce. Congress may "choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities," *United States v. Darby*, 312 U.S. 100, 121; see, also, *Currin v. Wallace*, 306 U.S. 1; *Thornton v. United States*, 271 U.S. 414; *Shreveport Rate Cases*, 234 U.S. 342; *Southern Railway Co. v. United States*, 222 U.S. 20.

A mere prohibition of the denial of accommodations to Negroes traveling in interstate commerce would not eliminate, even though it might curtail, the burden on interstate travel resulting from racial discrimination. *Senate Commerce Hearings*, at 207. First, such a limited prohibition would subject Negro travelers to the risks and burdens of being required to prove

that they were engaged in an interstate journey.^{49a} Interstate travelers do not carry passports; commonly, they lack proof that they are on an interstate trip. Even if some evidence of that fact could be furnished to a motel in one State by travelers from another State, it could rarely be furnished by residents of the State where the motel was located even though they were stopping over on either the beginning or the final leg of an interstate trip. Congress thus had good reason to spare interstate travelers the risk of being unable to prove that they were on an interstate trip and the burden of carrying some form of "passport" which would establish that fact. Compare *Thornton v. United States*, 271 U.S. 414; *Currin v. Wallace*, 306 U.S. 1.⁵⁰

More fundamental, requiring a Negro to prove that he was travelling in interstate commerce before furnishing equal accommodations would itself be a form of humiliating discrimination, which would burden interstate travel scarcely less than the sort of racial discrimination which the Act seeks to eliminate. Obviously, white travelers would not be required to carry and produce a proof of itinerary. As stated in *Baldwin v. Morgan*, 287 F. 2d 750, 759 (C.A. 5), a case involving segregated waiting rooms in a railroad terminal:

* * * whenever a complaint is received reporting that a Negro is sitting in the "Interstate

^{49a} See remarks of Senator Magnuson, Chairman of the Senate Commerce Committee, 110 Cong. Rec. 7177 (daily ed.).

⁵⁰ Moreover, the possibility for evasion by hotels which might refuse to accept the traveler's evidence that he was on an interstate trip would alone constitute a sufficient basis for upholding the statute. See *Everard's Breweries v. Day*, 235 U.S. 545.

and white intrastate" waiting room, the police officer is required to, and does, demand to see the tickets to verify the interstate status. As to those in interstate status, this is itself a denial of equal protection by policemen since white interstate travelers are not subjected to like treatment.

The Interstate Commerce Commission, for precisely the same reason, has issued regulations prohibiting a carrier from using terminals or vehicles for interstate purposes if any person (not only interstate travelers) is subjected to segregation or discrimination within such terminals or vehicles. See *Georgia v. United States, supra*, p. 48. Finding that "Negro interstate passengers are often required to establish affirmatively, as by producing a ticket, their interstate passenger status to avoid being subjected to racial segregation in the use of terminal facilities, a showing which is not required of white passengers," 86 M.C.C. 743, the Commission ruled (*id.* at 747):

* * * interstate passengers using such common facilities [may not] be subjected to any inquiry as to whether they are traveling in intrastate or interstate commerce. Such practices would result in discrimination prohibited by section 216(d). It is our view that to enforce the provisions of the act prohibiting unjust discrimination against interstate passengers it is necessary to prohibit the use in interstate operations of any vehicle or facility in which segregation is practiced.

Where it is impractical to separate the interstate from the intrastate transactions, or the attempt

at separation would itself burden interstate commerce, Congress has ample power to regulate both. This familiar principle is also amply illustrated by prior decisions. More than half a century ago, in *Southern Railway Co. v. United States*, 222 U.S. 20, the Court upheld the power of Congress to regulate the character of railway cars used in intrastate transportation where it was otherwise impossible to regulate those used in interstate commerce. In *Thornton v. United States*, 271 U.S. 414, the Court sustained a statute regulating the conditions under which cattle could be transported locally as well as in interstate commerce. *Currin v. Wallace*, 306 U.S. 1, upheld federal regulation of local transactions as well as interstate sales in tobacco markets.

II

TITLE II OF THE CIVIL RIGHTS ACT DOES NOT VIOLATE THE FIFTH AMENDMENT

A. THE PROHIBITION OF RACIAL DISCRIMINATION IN MOTELS DOES NOT DEPRIVE APPELLANT OF LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW

The Fifth Amendment does not bar congressional regulation of the business of operating a hotel or motel where the means adopted by Congress for fostering and promoting interstate commerce is reasonably adapted to that objective. Appellant has no "right," contrary to its contention, to select its guests as it sees fit, free from governmental regulation. The legislative power to regulate businesses affected with the public interest has been clear since the decision, in 1876, in *Munn v. Illinois*, 94 U.S. 113. A public inn

is, of course, one of the most ancient and plainest examples of a business affected with a public interest. The motel is its modern equivalent. Indeed, Mr. Justice Bradley specifically pointed out in the *Civil Rights Cases* themselves that innkeepers "by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them." 109 U.S. 3, 25. He was speaking specifically of racial discrimination.

While the common law duty of innkeepers is enough to answer appellant's claims under the Fifth Amendment, since he cannot set up the rights of others, we also emphasize that the power of Congress and State legislatures to regulate enterprises that affect the public welfare is confined to no fixed category. On the contrary, it is now settled that a State may subject to reasonable regulation all kinds of business and commercial activity. As the Court recently said in *Ferguson v. Skrupa*, 372 U.S. 726, 730-731:

* * * It is now settled that States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, * * *."

* * * We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

See, also, *West Coast Hotel Co. v. Parish*, 300 U.S. 379; *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525; *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488.

The restraints imposed on the national government, in this regard, by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth. *Bowles v. Willingham*, 321 U.S. 503. See, also, *United States v. Darby*, 312 U.S. 100, 125; *United States v. Rock-Royal Cooperative*, 307 U.S. 533, 569-570.

There is no reason to suppose that petitioner will suffer economic loss in the long run as a result of the prohibition of racial discrimination but, even if loss ensued, that consequence would not invalidate the statute. "A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciation in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power." *Bowles v. Willingham*, *supra*, at 518.

Nor does the prohibition of racial discrimination in a business which solicits public patronage interfere with personal liberty. The proprietor's relations with his patrons are commercial and casual. The innkeeper has conventionally been subject, since long before the Bill of Rights was adopted, to the common law duty to serve all travellers equally, without regard to personal preference, so long as he can accommodate them. See, *e.g.*, *Lane v. Cotton*, 12 Mod. 472, 484 (1701). It will hardly be contended that although

the liberty secured by the Fifth Amendment does not include freedom to discriminate against a traveler upon any other ground, it nevertheless includes freedom to discriminate against Negroes. Were the argument made, the Thirteenth, Fourteenth, and Fifteenth Amendments provide a complete answer.

Here, again, a long line of precedents has rejected the argument presented by appellants and sustains the constitutionality of the legislation. In *Railway Mail Association v. Corsi*, 326 U.S. 88, a labor union challenged a New York statute requiring such organizations to admit applicants to membership without discrimination upon grounds or race or color; arguing that the statute was "an interference with [the union's] right of selection to membership and abridgment of its property rights and liberty of contract." This Court upheld the statute. The Court has also sustained, against various constitutional challenges, a District of Columbia regulation prohibiting racial discrimination by restaurants, *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100; a Michigan law outlawing racial discrimination by water carriers, *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28; and a Colorado statute broadly banning racial discrimination in employment, *Continental Airlines v. Colorado Anti-Discrimination Commission*, 372 U.S. 714. In the *Thompson* case, the Court had occasion to consider the extent to which Congress had delegated law-making power to the District of Columbia. It concluded that the delegation was "as broad as the police power of a state" and therefore included the power to adopt

"a law prohibiting discriminations against Negroes by the owners and managers of restaurants in the District of Columbia." 346 U.S. at 110.

B. THE PROHIBITION OF RACIAL DISCRIMINATION IN MOTELS DOES NOT TAKE APPELLANT'S PROPERTY WITHOUT JUST COMPENSATION

There is no merit whatever to the claim that the statute amounts to a taking of appellant's property without just compensation. Making the doubtful assumption that appellant will suffer some economic injury as a result of compliance with the law, there is still no "taking" in the sense of the Fifth Amendment. "For consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material * * *. If, under any power, a contract or other property is *taken* for public use, the government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable." *Omnia Co. v. United States*, 261 U.S. 502, 510. See, also, *Bowles v. Willingham*, 321 U.S. 503; *Matveychuk v. United States*, 116 Ct. Cl. 859; *Snyder v. United States*, 113 Ct. Cl. 61. Thus, in *United States v. Central Eureka Mining Co.*, 357 U.S. 155, even the closing of a gold mine pursuant to a federal regulatory order was held not to be a taking within the meaning of the Amendment. And see *Jacob Rupert v. Caffey*, 351 U.S. 264; *United States v. Darby*, 312 U.S. 100, 125; *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389; *Legal Tender Cases*, 12 Wall. 457, 551.

III

TITLE II OF THE CIVIL RIGHTS ACT DOES NOT VIOLATE THE
THIRTEENTH AMENDMENT

Appellant's argument that the prohibition of racial discrimination against Negroes subjects it to involuntary servitude can be answered summarily. The Thirteenth Amendment "was adopted with reference to conditions existing since the foundation of our government, and the term 'involuntary servitude' was intended to cover those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results." *Butler v. Perry*, 240 U.S. 328, 332. No one can seriously contend that requiring a motel proprietor to accommodate Negroes on the basis of equality with guests of other races so long as he chooses to stay in business is a requirement "akin to African slavery."

The laws of thirty States and the District of Columbia prohibit racial discrimination in places of public accommodation.⁴¹ These laws (which would also have to fall upon appellant's theory) codify and extend the common-law innkeeper rule, which of course long predated the ratification of the Thirteenth Amendment.⁴² Certainly, appellant cannot believe that the Amendment was intended to abrogate this common-law principle. Mr. Justice Bradley, in the *Civil Rights Cases*, noted with approval that "[i]nnkeepers and public carriers, by the laws of all the

⁴¹ See Appendix C, *infra*, p. 71.

⁴² See, e.g., *Lane v. Cotton*, 12 Mod. 472, 484 (1701); *Rea v. Ivens*, 7 Carr. & Payne 213 (1835).

States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them" (109 U.S. at 25); he suggested, moreover, that if a State discriminatorily failed to enforce this principle in favor of Negroes, Congress would have the power to compel enforcement. *Ibid.*

The promise of the anti-slavery amendments was not merely the abolition of human bondage. The framers were equally determined to remove the widespread disabilities, associated with slavery, that branded the Negro a member of an inferior caste. To argue that these framers, by their very work, placed discrimination in public accommodations wholly beyond the reach of both federal and State law is nothing short of absurd.

CONCLUSION

It is respectfully submitted that the judgment should be affirmed.

ARCHIBALD COX,
Solicitor General.

BURKE MARSHALL,
Assistant Attorney General.

PHILIP B. HEYMANN,
Assistant to the Solicitor General.

HAROLD H. GREENE,
ALAN G. MARER,
Attorneys.

SEPTEMBER 28, 1964.

APPENDIX A

Title II of the Civil Rights Act of 1964, 78 Stat. 243-246:

TITLE II—INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMO- DATION

SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

SEC. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

SEC. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

SEC. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an appli-

eration for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

(b) In any action commenced pursuant to this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs; and the United States shall be liable for costs the same as a private person.

(c) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

(d) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a): *Provided*, That the court may refer the matter to the Community Relations Service

established by title X of this Act for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days: *Provided further*, That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

SEC. 205. The Service is authorized to make a full investigation of any complaint referred to it by the court under section 204(d) and may hold such hearings with respect thereto as may be necessary. The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

SEC. 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

SEC. 207. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(b) The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

APPENDIX B

Statistics furnished Congress by the Department of Commerce to show the average family expenditure for admissions, food eaten away from home, and automobile operations, for 3 income classes, in large northern and southern cities, by race, 1950

[Hearings before the Committee on Commerce, U.S. Senate, 88th Cong., 1st sess., on S. 1732 at 606]

| Income class and region | Admissions | | | Food eaten away from home | | | Automobile operation | | |
|--|------------|-------|---------------------------|---------------------------|-------|---------------------------|----------------------|-------|---------------------------|
| | Negro | White | Negroes percent of whites | Negro | White | Negroes percent of whites | Negro | White | Negroes percent of whites |
| \$2,000 to \$3,000: | | | | | | | | | |
| Large northern cities | \$31 | \$29 | 107 | \$148 | \$184 | 80 | \$52 | \$86 | 60 |
| Large southern cities | \$23 | \$36 | 64 | \$113 | \$194 | 58 | \$52 | \$95 | 55 |
| Northern expenditures as percent of southern | 135 | 81 | | 131 | 95 | | 100 | 91 | |
| \$3,000 to \$4,000: | | | | | | | | | |
| Large northern cities | \$45 | \$37 | 122 | \$138 | \$170 | 81 | \$67 | \$158 | 42 |
| Large southern cities | \$37 | \$30 | 95 | \$117 | \$180 | 65 | \$86 | \$170 | 51 |
| Northern expenditures as percent of southern | 122 | 95 | | 118 | 94 | | 78 | 93 | |
| \$4,000 to \$5,000: | | | | | | | | | |
| Large northern cities | \$57 | \$48 | 119 | \$182 | \$234 | 78 | \$148 | \$220 | 67 |
| Large southern cities | \$39 | \$45 | 87 | \$166 | \$257 | 65 | \$136 | \$225 | 60 |
| Northern expenditures as percent of southern | 146 | 107 | | 110 | 91 | | 109 | 98 | |

Source: "Study of Consumer Expenditure Income and Saving," tabulated by Bureau of Labor Statistics, U.S. Department of Labor, for Wharton School of Finance and Commerce, University of Pennsylvania, Philadelphia, Pa., 1956-57.

APPENDIX C

State public accommodation laws:

Alaska Stats. §§ 11.60.230-11.60.240 (1962); Calif. Civil Code §§ 51-54 (1954); Colo. Rev. Stats. §§ 25-1-1 to 25-2-5 (1953); Conn. Gen. Stats. Ann § 53.35 (1961); Del. Code Ann. tit. 6, ch. 45 (1963); Idaho Code §§ 18-7301 through 18-7303 (1961); Ill. Ann. Stats. (Smith-Hurd ed.) c. 38 §§ 13-1 to 13-4 (1961) c. 43 § 133 (1944); Ind. Stats. Ann. (Burns ed.) §§ 10-901 to 10-914 (1961); Iowa Code Ann. §§ 735.1-735.2 (1950); Kan. Gen. Stats. Ann. § 21-2424 (Supp. 1962); Maine Rev. Stats. C. 137 § 50 (1954); Md. Ann. Code § 49 B § 11 (1964); Mass. Ann. Laws C. 140 §§ 5 & 8 (1957), c. 272 §§ 92A, 9B (1963); Mich. Stats. Ann. §§ 28.343 and 28.344 (1962); Minn. Stats. Ann. § 327.09 (1947); Mont. Rev. Codes tit. 64 § 211 (1962); Neb. Rev. Stats. C. 20 §§ 101 & 102 (1954); N.H. Rev. Stats. Ann. C. 354 §§ 1, 2, 4 & 5 (1963); N.J. Stats. Ann. tit. 10 §§ 1-2 to 1-7; tit. 18 §§ 25-1 to 25.6 (1963); N.M. Stats. Ann. §§ 49-8-1 to 49-8-6 (1963); N.Y. Civil Rights Law (McKinney's ed.) Art. 4 §§ 40, 41 (1964); Exec. Law Art. 15 § 2901 (1964); Penal Law Art. 46 §§ 513-515 (1944); No. Dak. Cent. Code § 12-22-30 (1963); Ohio Rev. Code (Page's ed.) §§ 2901-35 and 2901-36 (1954); Oreg. Rev. Stats. §§ 30-670, 30-675, 30-680; (1963) Pen. Stats. Ann. title 18 § 4654 (1963); Rhode Island Gen. Laws §§ 11-24-1 to 11-24-6 (1956); So. Dak. Sess. Laws C. 58 (1963); Vt. Stats. Ann. title 13 §§ 1451, 1452 (1958); Wash. Rev. Code Ann. §§ 49.60.010 to 49.60-170, 9.91.010 (1962); Wisc. Stats. Ann. § 942-04 (1958); Wyo. Stats. Ann. § 6-83.1, 6-83.2 (1963); District of Columbia Code, title 47 §§ 2907, 2910 and 2911 (1961).

SUBJECT INDEX

| | Page |
|---|------|
| Interest of amicus curiae | 1 |
| Argument | 11 |
| The Public Accommodation Title of the Civil Rights Act of 1964 is a constitutional exercise of the power of Congress to regulate interstate commerce | 11 |
| Conclusion | 18 |

TABLE OF AUTHORITIES CITED

| Cases | Page |
|---|-------|
| Brown v. Board of Education, 347 U.S. 483 | 8 |
| Burks v. Poppy Construction Co., 57 Cal. 2d 463, 370 P. 2d 313 | 2, 8 |
| Caminetti v. United States, 242 U.S. 470 | 16 |
| Champion v. Ames, 188 U.S. 321 | 16 |
| Colorado Anti-Discrimination Commission v. Case, 380 P. 2d 34 | 10 |
| Crandall v. Nevada, 73 U.S. (Wall.) 35 (1867) .. | 6, 13 |
| Don Wilson Builders v. Superior Court, 220 Cal. App. 2d 77 | 3 |
| Edwards v. California, 314 U.S. 160 | 6 |
| Hipolite Egg Co. v. United States, 220 U.S. 45 | 16 |
| Hoke v. United States, 227 U.S. 308 | 16 |
| Houston E. & W. Texas Ry. v. United States, 234 U.S. 342 | 14 |
| Howell Chevrolet Co. v. NLRB, 346 U.S. 482 | 14 |
| Hughes v. Superior Court, 32 Cal. 2d 850, 198 P. 2d 885 | 2 |
| Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P. 2d 878 | 2, 8 |
| James v. Marinship Corp., 25 Cal. 2d 721, 155 P. 2d 329 | 2 |
| Mandeville Farms v. Sugar Co., 334 U.S. 219 | 14 |
| McDermott v. Wisconsin, 228 U.S. 15 | 14 |
| Mitchell v. United States, 313 U.S. 80 | 13 |
| Morgan v. Virginia, 328 U.S. 373 | 13 |

| | Page |
|--|--------|
| NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 | 14, 16 |
| NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 | 15 |
| Piluso v. Spencer, 36 Cal. App. 416 | 2 |
| United States v. Darby, 312 U.S. 100 | 14, 16 |
| United States v. Lassiter, 203 F. Supp. 20 | 13 |
| United States v. Sullivan, 332 U.S. 689 | 14 |
| Weeks v. United States, 245 U.S. 618 | 16 |
| Wickard v. Filburn, 317 U.S. 111 | 14, 15 |

Constitutions and Statutes

| | |
|--|----|
| California Constitution, Art. I, Sec. 1 | 2 |
| California Constitution, Art. I, Sec. 3 | 4 |
| Cal. Stats. 1897, Ch. 108 | 2 |
| Cal. Stats. 1893, Ch. 185 | 2 |
| Civil Rights Act of 1964, Sections: | |
| 201 (a) | 11 |
| 201 (b) | 11 |
| 204 (c) | 3 |
| 706 (b) | 3 |
| Fair Employment Practice Act, Labor Code, §§1410-1432 | 2 |
| Rumford Fair Housing Act, Health & Safety Code, §§ 35700-35744 | 2 |
| Unruh Civil Rights Act, Civil Code §§ 51-52 | 2 |

Other Authorities

Page

Report of the Commiteee on Commerce, United
States Senate, Civil Rigths—Public Accomoda-
tions, S. Rep. No. 872, 88th Congress 2d Session
.....5, 15

The Burden and the Glory: The Hopes and Pur-
poses of President Kennedy's Second and Third
Years in Office as Revealed in his Public State-
ments and Addresses, (New York: Harper &
Row, 1964) 8

IN THE
Supreme Court of the United States

October Term, 1964

No. 515

HEART OF ATLANTA MOTEL, INC.,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Appeal From the United States District Court for the
Northern District of Georgia.

**BRIEF OF THE STATE OF CALIFORNIA
AS AMICUS CURIAE.**

Interest of Amicus Curiae.

Because the policy of the State of California against discrimination on the basis of race, color, religion, national origin or ancestry has long been established by all branches of its government, and because the Civil Rights Act of 1964 has a substantial impact upon the rights of California's citizens in their interstate travels, the Attorney General of the State of California deems it appropriate to present this brief *amicus curiae* in support of the position of the United States.

Article I, section 1 of the California Constitution declares that:

"All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

Under this constitutional mandate, California's legislative, judicial and executive branches pursue a policy consonant with promotion of equal opportunity in the enjoyment of these rights for all of its citizens. California legislation promotes the state's public policy against racial and religious discrimination in the fields of employment¹ and housing,² and in the conduct of all business establishments of every kind whatsoever.³ Concern with equal access to places of public accommodation for all persons—the subject matter of these proceedings—may be traced in California back to the last century.⁴

The public policy of state and nation against racial discrimination has been recognized and strengthened by the decisions of California's courts.⁵ It has been of

¹Fair Employment Practice Act, Cal. Labor Code §§ 1410-1432.

²Rumford Fair Housing Act, Cal. Health & Safety Code §§ 35700-35744.

³Unruh Civil Right Act, Cal. Civil Code §§ 51-52.

⁴Cal. Stats. 1893, Ch. 185, p. 220; Cal. Stats. 1897, Ch. 108, p. 137.

⁵E.g., *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 382 P. 2d 878 (1963); *Burks v. Poppy Construction Co.*, 57 Cal. 2d 463, 370 P. 2d 313 (1962); *Hughes v. Superior Court*, 32 Cal. 2d 850, 198 P. 2d 885, aff'd 339 U. S. 460 (1949); *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329 (1944); *Piluso v. Spencer*, 36 Cal. App. 416 (1918).

equal concern to the executive departments of the state⁶ and to its chief law officer.⁷

The State of California is as jealous of the prerogatives of statehood under our federal system as any state in the union. We believe that Congress wisely deferred to local authority—insofar as it was both practicable and consistent with the national interest to do so—in the Civil Rights Act of 1964.⁸

⁶"This nation and state were founded on the principle that all men are created free and endowed with equal rights to secure the blessings of democracy without discrimination.

"To carry out the clear mandate of our Federal and State Constitutions, the Legislature has enacted laws to prohibit discrimination in employment, housing, schools, and places of business. These laws, enunciating the State's public policy of nondiscrimination, have been supported by executive action and upheld by judicial decree.

"But the laws, court edicts, and official pronouncements are only a beginning. If discrimination and segregation have been legally forbidden, a more subtle, but equally restrictive, *de facto* discrimination exists and grows. Justice demands that we not only banish old forms of discrimination but that we act affirmatively to assure those who contribute fully to our society a chance to share fully in its rewards.

"To meet the obligation of the State and under the authority vested in me by the Constitution, I hereby proclaim the following Code of Fair Practices to be the official policy of the Executive Branch of the State of California."

Introductory statement to "*Governor's Code of Fair Practices*," signed by Governor Edmund G. Brown on July 24, 1963.

⁷See, e.g., *Don Wilson Builders v. Superior Court*, 220 Cal. App. 2d 77 (1963).

⁸Civil Rights Act of 1964, Sections 204(c) and 706(b):

"Sec. 204. . . .

"(c) In the case of an alleged act or practice prohibited by this title which occurs in State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of

We recognize, however, that the Civil Rights Act of 1964 deals with a matter of national concern in which the Congress of the United States has a legitimate and pre-eminent interest. In such a situation, where some states choose not to act or to act in a manner inconsistent with the national welfare, the interests of both state and nation demand that our federal government remain free to act.

California's concern with the rights of her citizens cannot be limited by her own borders. California, though a sovereign state, is proclaimed by its constitution an inseparable part of the American union.⁹ Over one hundred years of history reinforce that proclamation. California's economy and people are firmly welded into the single economic and social unit which constitutes our great nation.

thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings."

"Sec. 706.

"(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law."

⁹Cal. Const. Art. I, § 3.

California industry is a prime recipient of government contracts,¹⁰ which can necessitate travel to the nation's capital or defense installations in other states. Californians serve in the armed forces of our nation, which frequently requires them to travel through and reside in sister states during their period of service.¹¹ Citizens of California, in the course of their business

¹⁰According to information received by our office from the California State Office of Planning, Department of Defense prime contract awards for the fiscal year 1962-63 amounted to \$5,888,357,000 and NASA first tier prime contracts for the period January 1962 through October 1963 totaled \$493,259,677.

¹¹"

"Off-base discrimination against minority groups within the Armed Forces generates a serious morale problem for the military. In consideration of the purpose and the mission of the Military Establishment, it is neither feasible, expedient, nor justifiable to assign personnel to duty stations on the basis of race, color, or national origin. Consequently, servicemen belonging to minority groups have been forced to accept a set of standards, and have been denied privileges enjoyed by other military personnel in those areas where local custom supports discriminatory practices.

"Military personnel, like other members of the American public, must rely upon the availability of public accommodations when traveling to new duty stations, when living in a civilian community adjacent to their duty station, or when on temporary duty in connection with military maneuvers. Unlike most civilians, military personnel are required to move their families upon completion of a 3- to 4-year tour of duty. As a matter of military necessity, the serviceman moves when and where ordered. When servicemen, who are members of a minority group, encounter discriminatory practices in the course of a move, or upon arrival at their new duty station, they are required to assume additional problems which constitute an unnecessary and unjustifiable burden. The morale and discipline caused by such inequities can only have an adverse effect on military operations."

Statement by General Counsel of the Department of Defense, Report of the Committee on Commerce, United States Senate, *Civil Rights—Public Accommodations*, S. Rep. No. 872, 88th Congress, 2d Session pp. 27-28 (1964).

and employment, must utilize places of public accommodation throughout the United States.¹²

Of no less significance to our national well-being is interstate travel for educational and recreational purposes, including visitation of our great national shrines located in other states.

Students and scholars from California may visit the Georgia Institute of Technology or the University of Georgia. California families may spend their summer in the 230-year old city of Savannah, or visit the shrine to President Roosevelt at Warm Springs, or travel to Chickamauga and Chattanooga National Military Park—the oldest and largest historical area established by the federal government in the United States. This commerce in people binds our nation together in a way that commerce in products alone could never do.

The right of California's citizens to move freely among the several states is not only a necessary and proper subject of the exercise of Congress' power under the commerce clause¹³ but a basic and essential attribute of United States Citizenship.¹⁴ The inability of the residents of one state to obtain satisfactory and convenient accommodations in another state solely because

¹²On July 1, 1964, 17,137 corporations had payroll or property in California and at least one other state according to information furnished to us by the Franchise Tax Board of the State of California.

One of these corporations was Interstate Hosts, Inc., which owns and operates a restaurant within the Heart of Atlanta Motel and has its offices in Los Angeles, California (Plaintiff's Statement of Issues, R. 16). A Negro employee of this corporation from Los Angeles visiting the Atlanta restaurant for business purposes could not stay in the Heart of Atlanta Motel.

¹³*Edwards v. California*, 314 U. S. 160 (1941).

¹⁴*Crandall v. Nevada*, 73 U. S. (6 Wall.) 35 (1867). Cf. *Edwards v. California*, *supra*, at 177 [Concurring opinion].

of their race or color clearly interferes with their constitutionally protected right as citizens of the United States to travel among the several states.

Yet California, acting alone, cannot adequately protect her citizens or facilitate their travel once they leave the state. Only the United States government can strike down such barriers to interstate commerce.

California has another concern with the national impact of the Civil Rights Act of 1964 beyond that of its effect on her own citizens in their interstate travels. The highways of America carry commerce in two directions. They bring visitors and new residents to California, even as they take residents of California to visit other states.¹⁵ California is not unacquainted with both the blessings and the problems which such commerce brings.¹⁶

¹⁵In 1963, 2,771,712 automobiles with foreign license plates carrying 7,374,890 passengers passed through border quarantine stations according to information furnished to us by the Bureau of Plant Quarantine, California State Department of Agriculture. Figures for 1964 are running substantially higher. The average yearly net increase in California residents resulting from immigration from other states was 271,400 according to information furnished to our office from the California State Office of Planning. In addition, in September of 1963, California had an estimated population of 15,600 migratory farm workers who had come from other states.

¹⁶A generation ago California experienced a wave of immigration of tenant farmers and sharecroppers from the South and Southwest springing from the affects of the depression and the dust bowl. One view of the undeniable problems they brought with them is graphically presented in appellee's argument in the *Edwards* case, *supra*, summarized at pp. 167-68.

Last year, President Kennedy presented another aspect of the problem in his speech on June 6 at San Diego State College on "Our Educational Deficiencies and the Remedy."

" . . . American children today do not yet enjoy equal educational opportunities for two primary reasons: One is economic and the other is racial. . . . It does no good, as

When travelers—both transient guests and new residents—enter California, the government of this state is properly concerned with the place which these newcomers find in the state's life. But this, in turn, may be largely determined by the conditions under which they lived prior to coming to California.

Those subjected throughout their lives to discrimination based solely on their race or color bring with them the handicaps which discrimination imposes. The supreme courts of both California¹⁷ and the United States¹⁸ have recognized that "separate but equal" education is inherently inferior education. The Supreme Court of California has pointed to the problems of anti-social behavior¹⁹ and crime, disease and immorality²⁰ stemming from segregated housing.

Discrimination in the use of the services and facilities of places of public accommodation may not be the

you in California know better than any, to say that is the business of another state. It is the business of our country. These young, uneducated boys and girls know no state boundaries and they come West as well as North and East. They are your citizens as well as citizens of this country."

The Burden and the Glory: The Hopes and Purposes of President Kennedy's Second and Third Years in Office as Revealed in his Public Statements and Addresses. (New York: Harper & Row, 1964), page 260.

The lesson is clear. Great problems in any part of the nation cannot be fenced out or forgotten by the rest of the nation. Where individual states cannot or will not act, the United States must be able to do so.

¹⁷*Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 382 P. 2d 878 (1963).

¹⁸*Brozen v. Board of Education*, 347 U. S. 483 (1954).

¹⁹*Jackson v. Pasadena City School Dist.*, 59 Cal. 2d at 881, 382 P. 2d at 881.

²⁰*Burkes v. Poppy Construction Co.*, 57 Cal. 2d 463, 471, 370 P. 2d 313, 317 (1962).

root of those evils to man and society which spring from denial of equal opportunity based on race or color. But who can fully measure the extent of the psychological injury which it works, or the disregard for fundamental principles of human dignity and decency which it inculcates?

Racial discrimination leaves its mark not alone upon those discriminated against. It also may affect those, not themselves the victims of such discrimination, who grow up in a society where racial discrimination is common practice. Even after leaving that society, such individuals may continue to engage in and condone those discriminatory practices which are not only incompatible with national public policy, but in violation of the laws of California. Such conduct aggravates the difficult problems faced by state government, its courts of law and legal officers, in creating an atmosphere in which those laws will be respected and readily observed.

There is yet another manner in which the interests of our state, as well as the interests of the nation, are affected by the Civil Rights Act of 1964. The language of the Supreme Court of Colorado in passing upon the Colorado Fair Housing Act of 1959 is equally applicable to the Federal Civil Rights Act of 1964:

"When, as at present, the entire world is engulfed in a struggle to determine whether the American concept of freedom with equality of opportunity shall survive; when tyrannical dictators arrayed against this nation in the struggle proclaim throughout the world, with some justifica-

tion, that we do not practice what we preach, and that 'equality of opportunity' is a sham and a pretense, a hollow shell without substance in this nation; we would be blind to stark realities if we should hold that the public safety and the welfare of this nation were not being protected by the Act in question. Indeed, whether the struggle is won or lost might well depend upon the ability of our people to attain the objectives which the Act in question is designed to serve."²¹

For the foregoing reasons, we take this opportunity to express our accord with the philosophy of the Civil Rights Act of 1964, and recognize its passage as the necessary and proper exercise of the power of Congress over commerce among the several states.

²¹*Colorado Anti-Discrimination Commission v. Case*, 380 P. 2d 34, 41-42 (Colo., 1962).

ARGUMENT.

The Public Accommodation Title of the Civil Rights Act of 1964 Is a Constitutional Exercise of the Power of Congress to Regulate Interstate Commerce.

The Public Accommodation Title of the Civil Rights Act of 1964 provides that:

"All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." Civil Rights Act of 1964, Section 201(a).

Places of public accommodation covered by the Act include any inn, hotel, motel, or other establishment which provides lodging to transient guests, and any facility principally engaged in selling food for consumption on the premises, which serves or offers to serve interstate travelers, or where a substantial portion of the food which it serves has moved in interstate commerce. Civil Rights Act of 1964, Section 201(b).

The Heart of Atlanta Motel is a Georgia corporation whose only place of business is in Atlanta, Fulton County, Georgia. [Complaint for Declaratory Judgment, R. 5.] The motel has 216 rooms for lease or hire to transient guests only. Approximately seventy-five per cent of the total number of guests who register at the motel are from outside the state of Georgia. [Stipulation of Facts, R. 17.]

Thus the Public Accommodation Title of the Civil Rights Act of 1964 clearly applies to appellant Heart

of Atlanta Motel. The question before this court is whether the Civil Rights Act of 1964, as applied to the Heart of Atlanta Motel, exceeds constitutional limitations on the exercise of federal power over interstate commerce.

The commerce power of the United States, more than any of the other powers conferred by the Constitution on our federal government, binds our nation together and makes of it an indivisible whole. None can gainsay that the use of this power and the activities reached through that use have expanded greatly since 1789. This has resulted not only from a changing interpretation of the commerce clause, but also from a drastic change in the nature of interstate commerce.

Most markedly during the past thirty years, history has forced Americans to the realization that the states which comprise our modern nation are bound inextricably together, and that no state can remain aloof. Events once considered matters of purely local concern can have drastic consequences for the commerce of other states.

A strike in California can deprive the citizens of New York of food for their tables. Dust storms in Oklahoma can drive tens of thousands of people to California for refuge. Harvests in Iowa affect farm prices in Illinois. Working conditions in Chicago affect the conditions of workers in competing firms in New York and San Francisco.

Similarly, racial discrimination in one state affects the commerce of other states and the rights of their citizens. The statement of the interest of the State of California in the Civil Rights Act of 1964 equally demonstrates the interest of Congress on behalf of the

entire nation. After exhaustive study, Congress determined that racial discrimination adversely affects interstate commerce. This determination may not be overturned unless clearly arbitrary and unreasonable.

Precedent for the exercise of the commerce power through the Public Accommodation Title of the Civil Rights Act of 1964 is ample and persuasive. This court has long recognized the legitimate federal interest in the conditions under which travelers pass among the several states and restrictions placed upon their travel. *Crandall v. Nevada*, 73 U. S. (6 Wall.) 35 (1867); *Mitchell v. United States*, 313 U. S. 80 (1941); *Morgan v. Virginia*, 328 U. S. 373 (1946); *United States v. Lasser*, 203 F. Supp. 20 (W. D. La.) (*Per Curiam*), aff'd 371 U. S. 10 (1962).

Mitchell v. United States, *supra*, concerned the availability of Pullman accommodations. *Morgan v. Virginia*, *supra*, involved the burden placed on interstate bus passengers through state laws requiring segregated seating. Surely the difficulties encountered by automobile passengers in finding places of refreshment and rest on their interstate journeys impose a burden on interstate commerce as great as the unavailability of Pullman accommodations or the requirement that passengers change their seats on an interstate bus. Surely an act of Congress regulating interstate commerce requires greater respect than the requirements of the commerce clause in the absence of a federal statute.

It is true, of course, that the *Mitchell* and *Morgan* decisions involved interstate carriers already under federal regulation. But the automobile has displaced train and bus as the major means of passenger transportation, largely as a result of the expenditure of billions

of dollars of federal tax money on our interstate highway system. Places of public accommodation, both on and off the highway, are as essential to the interstate driver and his passengers as depot and terminal facilities are to rail and bus passengers, and the interstate traveler by air or rail may equally require such accommodation during the course of his journey.

It is no answer to assert that a place of public accommodation is "local" in character or "intrastate" in its operations, and thus lies beyond the congressional commerce power, where Congress has reasonably determined that its business affects commerce. Congress may lawfully regulate conditions and conduct in business establishments which either produce or receive goods which travel in interstate commerce. *Howell Chevrolet Co. v. NLRB*, 346 U. S. 482 (1953); *United States v. Sullivan*, 332 U. S. 689 (1947); *United States v. Darby*, 312 U. S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *McDermott v. Wisconsin*, 228 U. S. 115 (1912). Congressional power also extends to intrastate activities where regulation of the intrastate commerce is necessary to regulate or protect interstate commerce. *Wickard v. Filburn*, 317 U. S. 111 (1942); *Houston, E. & W. Texas Ry. v. United States*, 234 U. S. 342 (1914); *Maudeville Farms v. Sugar Co.*, 334 U. S. 219 (1948).

In determining the effect which places of public accommodation have upon interstate commerce, consideration cannot be limited to the particular place of public accommodation whose case is before this court.

In *Wickard v. Filburn*, *supra*, the court upheld the commerce power, exercised through the Agricultural Adjustment Act of 1938, to regulate a farmer who

sowed twenty-three acres of wheat entirely for his own consumption. The court said:

"That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Wickard v. Filburn, supra*, at pp. 127-28.

Similarly, in ruling on the jurisdiction of the National Labor Relations Board, this court has pointed out:

"Whether or not practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far reaching in its harm to commerce." *NLRB v. Reliance Fuel Oil Corp.*, 371 U. S. 224, 226 (1963) (*Per curiam*).

Certainly this rule is equally applicable to a determination of the effects of racial discrimination in places of public accommodation. It was the cumulative effect of widespread patterns of segregation and discrimination, the manifestations of which have been continually before this court during the past ten years, which necessitated federal action through the Civil Rights Act of 1964.²²

²²Report of the Committee on Commerce, United States Senate, *Civil Rights-Public Accommodations*, S. Rep. No. 872, 88th Congress, 2d Session, pp. 15-16 (1964).

Racial discrimination in places of public accommodation affects commerce among the states in yet another manner. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), this court recognized that the stoppage of commercial operations by industrial strife could have a serious effect on interstate commerce. Racial strife in various parts of the country can lead to forms of economic retaliation and coercion not unlike those which marked the labor struggles of the 1930's.²³ These, in turn, may curtail the flow of goods into California, or from California into other states, thereby affecting the commerce of our state and of the nation.

Congressional use of the commerce power in the Civil Rights Act of 1964 is neither novel nor alarming. Congress has frequently acted through its commerce power, not only to regulate commerce, but to promote the welfare and safety of the nation through regulating activities which affect commerce. See, e.g., *United States v. Darby*, 312 U. S. 100 (1941) (Fair Labor Standards Act); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937) (National Labor Relations Act); *Weeks v. United States*, 245 U. S. 618 (1918) (misbranding under Pure Food and Drug Act); *Caminetti v. United States*, 242 U. S. 470 (1917) (White Slave Traffic Act); *Hoke v. United States*, 227 U. S. 308 (1913) (White Slave Traffic Act); *Hipolite Egg Co. v. United States*, 220 U. S. 45 (1911) (Pure Food and Drug Act); *Champion v. Ames*, 188

²³*Id.* at 8, 9, 19-20 (1964).

U. S. 321 (1903) (Anti-lottery law). Thus, where social injustices occur in commercial activities, the commerce power is a natural and familiar means for dealing with them.

Professor Paul Freund posed the question now before this court in his analysis of the Public Accommodation Title appended to the report of the Senate Committee on Commerce:

"The question is whether the same power that has been used in the interest of preventing deception, disease, and immorality, as well as discrimination against members of unions and against small business, shall be utilized in the interest of preventing discrimination among patrons of establishments whose practices have repercussions throughout the land and which take advantage of the facilities of our national commercial market for their patronage or their supplies or both."²⁴

The answer of Congress, of California, and of this court—founded in sound principles of constitutional law, and following the dictates of justice and the mandate of history—can only be yes.²⁵

²⁴*Id.* at 87 (1964).

²⁵Since—in the view we take of this case—the commerce power is clear, we do not address ourselves to the alternate sources of federal power to support the judgment against appellant Heart of Atlanta Motel.

The views expressed in this brief are equally applicable to the decision of the United States District Court for the Northern District of Alabama in *McClung v. Katzenbach*, Civ. No. 64-448, Sept. 17, 1964. We believe that decision was in error, and should be reversed by this Court.

Conclusion.

For the above reasons, the State of California submits that the Public Accommodation Title of the Civil Rights Act of 1964 is a constitutional exercise of the power of Congress to regulate interstate commerce. The State of California, therefore, prays that the judgment as entered below in the United States District Court for the Northern District of Georgia be affirmed, and appellant Heart of Atlanta Motel's appeal therefrom be denied.

Respectfully submitted,

THOMAS C. LYNCH,
*Attorney General of the
State of California,*

CHARLES E. CORKER,
DAN KAUFMANN,
Assistant Attorneys General

CHARLES B. MCKESSON,
JEROLD L. PERRY,
*Deputy Attorneys General,
Attorneys for Amicus Curiae.*

FILE COPY

Office-Supreme Court, U.S.

FILED

SEP 28 1964

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of
The United States

October Term, 1963

No. 515

HEART OF ATLANTA MOTEL, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AMICUS CURIAE BRIEF OF THE
STATE OF FLORIDA

JAMES W. KYNES
Attorney General of Florida

FRED M. BURNS
Assistant Attorney General of Florida

JOSEPH C. JACOBS
Assistant Attorney General of Florida

TOPICAL INDEX

| | Page |
|----------------------------------|---------|
| STATEMENT OF THE CASE | 2, 3 |
| SPECIFICATION OF POINTS INVOLVED | 3, 4 |
| SUMMARY OF THE ARGUMENT | 4, 5, 6 |
| FEDERAL CIVIL RIGHTS ACT OF 1964 | 6-11 |
| CONSTITUTIONAL PROVISIONS | 11-13 |
| ARGUMENT | 13-36 |

TABLE OF CITATIONS

| | |
|--|--------|
| A. L. A. Schechter Poultry Corporation v. United States, 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. text 50 | 28 |
| Buchanan v. Warley, 245 U. S. 60, text 77, 38 S. Ct. 1570, text 1587 | 15 |
| Burton v. Wilmington Parking Authority, 365 U. S. 715, text 50, 81 S. Ct. 865, 6 L. ed. 2d. 45, text 50 | 17 |
| Carter v. Carter Coal Company, 298 U. S. 238, text 297, 56 S. Ct. 855, 80 L. ed. 1160, text 1182 | 23 |
| 56 S. Ct. 855, 80 L. ed. 1160, text 1188 | 26, 28 |
| Cooper v. Aaron, 358 U. S. 1, text 17 and 18, 78 S. Ct. 1401, 3 L. ed. 2d. 5, text 16 | 17 |
| Maxwell v. Dow 170 U. S. 581, text 593, 20 S. Ct. 448, 44 L. ed. 597, text 601 | 16 |

| | |
|--|----|
| Nixon v. Herndon, 237 U. S. 536, text 541, 47 S. Ct. 446, 71 L. ed. 759, text 761 | 15 |
| Packer Corporation v. Utah, 285 U. S. 105, 52 S. Ct. 273, 76 L. ed. 643, text 648 | 32 |
| Pacific States Box and Basket Company v. White, 296 U. S. 176, text 184, 56 S. Ct. 159, 80 L. ed. 138, text 145 | 31 |
| Peterson v. Greenville, 373 U. S. 244, text 247, 83 S. Ct. 1119, 10 L. ed. 2d. 323 | 17 |
| Rice v. Sioux City Cemetery, 349 U. S. 70, text 72, 75 S. Ct. 614, 99 L. Ed. 897 | 16 |
| Rubber Tire Wheel Company v. Goodyear Tire and Rubber Company, 232 U. S. 413, text 419, 34 S. Ct. 403, 58 L. ed. 663, text 667 | 30 |
| Slaughter House cases, 83 U. S. 36, text 73, 21 L. ed. 394, text 407 and 408 | 16 |
| United States v. Yellow Cab Company, 332 U. S. 218, text 230 and 231, 67 S. Ct. 1560, 91 L. ed. 2010, text 2020 | 29 |
| Wabash Railroad Company v. Pearce, 192 U. S. 179, text 188, 24 S. Ct. 231, 48 L. ed. 397, text 400 | 26 |
| Weigle v. Curtice Brothers Company, 248 U. S. 285, text 286-288, 39 S. Ct. 124, 63 L. ed. 242, text 249 and 250 | 31 |

UNITED STATES CONSTITUTION

| | |
|--|------------------------------|
| ARTICLE I, Section 8 | 3, 12, 18, 19, 22, 23 |
| FIFTH AMENDMENT | 12 |
| TENTH AMENDMENT | 12 |
| (FIRST TEN AMENDMENTS—BILL OF RIGHTS) | 13 |
| FOURTEENTH AMENDMENT | 4, 11, 14, 17, 18, 23, 34 |

STATUTES

| | |
|--|------------------------------|
| Public Law 88-352; 78 Stat. 241, et seq. | |
| Title II, 201-207 | |
| TITLE III, 301-304 | 3, 4, 7, 8, 9, 19, 21, 33 |
| (Civil Rights Act of 1964) | |

TEXTS

| | |
|--|----|
| 11 American Jurisprudence 18, section 17 | 26 |
| 11 American Jurisprudence 1098, section 311 | 15 |
| 12 American Jurisprudence 128, section 468 | 15 |

| | |
|--|--------|
| 12 American Jurisprudence 133-134, section 471 | 15 |
| 15 American Jurisprudence 2d. 647 and 648, section 17 | 27, 28 |
| 15 American Jurisprudence 2d. 702 and 703, section 59 | 27 |
| 15 Corpus Juris Secundum, 290 and 291, section 25 | 25 |
| 16A Corpus Juris Secundum, 307 and 308, section 505 | 15 |

IN THE

Supreme Court of
The United States

October Term, 1963

No.

HEART OF ATLANTA MOTEL, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

AMICUS CURIAE BRIEF OF THE
STATE OF FLORIDA

JAMES W. KYNES
Attorney General of Florida

FRED M. BURNS
Assistant Attorney General of Florida

JOSEPH C. JACOBS
Assistant Attorney General of Florida

STATEMENT OF THE CASE

In this case, the petitioner, the Heart of Atlanta Motel, Inc., a corporation, owns and operates a large motel and restaurant business on Courtland Street in the City of Atlanta, Georgia, the same being located some two blocks from downtown Peachtree Street in said Atlanta, Georgia, readily available to travelers traveling over United States Highways 23 and 41 as well as Interstate Highways 75 and 85. This appears to be a large motel having available for transit occupancy probably two hundred or more rooms, as well as a restaurant and lounge available for the use of their customers and maybe others. It is here presumed that among the motel, restaurant and lounge customers there are interstate customers and travelers; however, we are not advised of the ratio of such interstate customers to the intrastate customers.

Doubtless equipment articles, including beds and bedding, room furnishing, towels, washrags and other items used in the operation of the motel were at one time in interstate movement, either as finished products, or materials subsequently used in the manufacture or preparation of such equipment; however, we are of the opinion that such equipment articles and products used, or to be used in their manufacture or preparation, had ceased to be articles of interstate or foreign commerce before being put to use in connection with the operation and maintenance of the said motel.

Doubtless many items of food and other products, used in the preparation of the food and other products, actually

sold and served in the restaurant and lounge to customers thereof had, prior to being so sold and served, passed through interstate or foreign commerce, but had ceased to be articles of commerce before being sold and delivered to customers of the said restaurant and lounge for consumption as customers thereof.

It appears that the said owners and operators of the said Heart of Atlanta Motel and its restaurant and lounge have refused to rent to certain persons or classes of persons motel accommodations in the said motel, or to serve such persons or classes of persons in its restaurant and lounge, which refusal is deemed by the United States to be violative of Title II of the Civil Rights Act of 1964 of the United States (Public Law 88-352; 78 Stat. 241). This refusal seems to put in issue the validity and constitutionality of the provisions of sections 201 - 207, Title II, of said Public Law 88-352, as well as sections 301 - 304, Title III, of said Public Law 88-352, which seems to involve a construction of said Public Law 88-352 and section 8, Article I, of the United States Constitution, insofar as the same relate to commerce, and the Fourteenth Amendment to the United States Constitution.

SPECIFICATION OF POINTS INVOLVED

The following questions appear to be here presented for review and determination:

1. ARE THE PROVISIONS OF TITLES II AND III OF PUBLIC LAW 88-352, ACTS OF 1964 (78

Stat. 241, et seq.) PROHIBITING DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATIONS BY THE OPERATORS OF SUCH PLACES, VALID AND CONSTITUTIONAL UNDER THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

- 2. ARE THE PROVISIONS OF SAID TITLES II AND III OF SAID PUBLIC LAW 88-352, RELATING TO DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION BY THE OPERATORS OF SUCH PLACES, VALID AND CONSTITUTIONAL UNDER THE PROVISIONS OF SECTION 8, ARTICLE I, OF THE UNITED STATES CONSTITUTION, RELATING TO COMMERCE WITH FOREIGN NATIONS, AMONG THE STATES AND WITH INDIAN TRIBES?**

SUMMARY OF THE ARGUMENT

This litigation involves the validity of the public accommodations provision in the Civil Rights Act of 1964 (Public Law 88-352; 78 Stat. 241) under the commerce clause and the Fourteenth Amendment of the United States Constitution, as applied to a motel, restaurant and lounge in Atlanta, Georgia, not operated in connection with a railroad, bus line, air line, or other transportation facility operating interstate, but which may incidentally and from time to time serve an interstate traveler, and which may also use in the preparation of food for service

in its restaurant food products which may have prior to receipt by the restaurant moved in the stream of interstate commerce.

Under the Fourteenth Amendment to the United States Constitution, its operation is against state, and not individual and corporate action. The said public accommodations provisions of the said Civil Rights Act of 1964 are directed against individual and corporate action, by the owners and operators of places of public accommodation, and not against state action. It is Florida's contention that the public accommodations provisions of the said Civil Rights Act of 1964, being directed against individual and corporate action, and not state action, are invalid and unauthorized and not within the purview of the said Fourteenth Amendment to the Constitution of the United States.

There being no showing that the Heart of Atlanta Motel, Inc., a corporation, is actively engaged in interstate commerce, its connection with such commerce being, at the most, only incidental and not direct, consisting in the renting of a room to an interstate traveler on some occasions, but then unconnected with any business having a direct connection with interstate commerce, and the serving of foods prepared by it from food products that may have moved in interstate commerce prior to its purchase for such purpose, and prior to the time it was purchased and used for such preparation of foods for service in its restaurant. It seems evident from the record in this case that such interstate commerce terminated and came

to an end prior to the use of such food products in the preparation of the said food and prior to the time such food was served to the restaurant customers. Interstate commerce having terminated prior to the sale and service of the food to the customer, there is nothing to support the application of the Civil Rights Act to the service of food in restaurants and other places of accommodation not bearing a direct and specific connection with interstate commerce. In connection with the sale of gasoline and other products to motor vehicle owners, by dealers in such gasoline and other products, any interstate movements of the said products come to an end prior to the actual sale of the same, so that such sales are not sales having a direct connection with such commerce. This being true, the provisions of the said Civil Rights Act of 1964, are not supported by the said commerce clause of the United States Constitution, and are therefore invalid as applied to such sales.

FEDERAL CIVIL RIGHTS ACT OF 1964

The second session of the 88th Congress of the United States enacted House Resolution 7152 of that session and sent the same to the President of the United States who, on July 2, 1964, approved the same and it became a law now designated as Public Law 88-352 (78 Stat. et seq.) which statute has become effective as to many portions thereof, including the portion thereof relating to Places of Public Accommodation. Title II of said Public Law 88-352 relates to discrimination in Places of Public Accommodation, subsection (a) of section 201 of said act defines *the General Application of said title*, providing that:

"All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

Places of public accommodation, within the purview and operation, are defined in paragraph (b) of section 201 of said Public Law 88-352, as follows:

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment: (A)

(i) which is physically located within the premises of any establishment otherwise covered by this subsection; or

(ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment."

The conditions under which the operation of such public accommodations affect interstate commerce are defined in paragraph (c) of said section 201 of said Public Law 88-352, said paragraph being as follows:

"(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b) it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce;

(3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises an establishment the operations of which affect commerce within the meaning of this subsection.

For purposes of this section 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same state but through any other State or the District of Columbia or a foreign country.

The circumstances when discrimination and segregation are deemed to be supported by State action, are defined and set out in paragraph (d) of said Section 201, of said Public Law 88-352, said paragraph being as follows:

"(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation

(1) is carried on under color of any law, statute, ordinance, or regulation; or

(2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or

(3) is required by action of the State or political subdivision thereof."

Certain limited exceptions and conditions are made to and from the said Federal Civil Rights Act of 1964 by paragraph (e) of section 201 thereof, said paragraph being as follows:

"(e) The provisions of this title (Title II) shall not apply to private clubs or other establishments not in fact open to the public, except to the extent that the facilities of such establishments are made available to the customers or patrons of an establishment within the scope of subsection (b)."

The following other provisions and portions of said Public Law 88-352, the same being the Federal Civil Rights Act of 1964, may have some bearing on the questions herein considered and discussed, to wit:

Section 202 of said Federal Civil Rights Act of 1964 is as follows:

"All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation

is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof."

Section 203 of said Federal Civil Rights Act of 1964 is as follows:

"No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202."

CONSTITUTIONAL PROVISIONS

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, insofar as here material, that:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.
2. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

3. No State shall deprive any person of life, liberty or property, without due process of law;
4. Or deny to any person within its jurisdiction the equal protection of the laws.
5. Congress is vested with power to enforce, by appropriate legislation, the above-mentioned provisions.

Under the above constitutional provisions all persons, regardless of race, color, creed or previous condition of servitude, who were born in the United States, are citizens of the United States and of the state wherein they reside, and are entitled to same legal privileges, immunities and protection as are other such citizens of the United States.

Under Section 8, Article I, of the United States Constitution, Congress is vested with power to provide for the General Welfare of the United States (clause 1), to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes (clause 3), and to carry such powers into execution (clause 18).

The Fifth Amendment to the Constitution of the United States provides, insofar as here material, that no person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Tenth Amendment to the Constitution of the United States provides that "the powers not delegated to

the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people."

"The first ten amendments to the federal constitution, commonly known as the 'bill of rights', guaranteeing protection to certain rights of the people, do not apply to the states, but constitute limitations on the power of the federal government only, and are not grants of power." (16 C. J. S. 185 and 186, section 69). The provisions in the Fourteenth Amendment to the United States Constitution, that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," was doubtless designed to give the people of the several states and of the United States the same protection from state action as was given the people of the several states and of the United States against federal action by the Fifth Amendment above-mentioned. Neither the United States nor the states may deprive any person of life, liberty or property without due process of law or deny to any person within their jurisdiction the equal protection of the laws.

ARGUMENT

FIRST QUESTION:

ARE THE PROVISIONS OF TITLES II AND III OF PUBLIC LAW 88-352, ACTS OF 1964 (78 Stat. 241, et seq.) PROHIBITING DISCRIMINATION IN

PLACES OF PUBLIC ACCOMMODATIONS BY THE OPERATORS OF SUCH PLACES, VALID AND CONSTITUTIONAL UNDER THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

Section 1 of the Fourteenth Amendment to the Constitution of the United States, is divided into two separate sentences. *First* is the declaration that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside." This declaration does not seem to require legislation to make the same effective. So far as we are advised no definition of citizenship was previously found in the Constitution of the United States, nor had any attempt been made by Congress to define it. *Second*, there are the declarations that (a) *no state* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, (b) *no state* shall deprive any person of life, liberty or property, without due process of law, and that *no state* shall deny to any person within its jurisdiction the equal protection of the laws. The prohibitions here are against the states, not against persons, firms and corporations. The prohibitions of this amendment are restrictions on state action, not restrictions on personal or corporate action. Here *the discrimination in a place of public accommodation* charged against the Heart of Atlanta Motel, Inc., a corporation, is not the result of state action, but of the action by a corporation by and through its officers and agents. The attempted enforcement is against the Heart of Atlanta Motel,

Inc., and not against the State of Georgia or its agency. The discrimination has been brought about by the act of a person, firm or corporation, and not the act of the State or its agent.

It is stated in 16A C. J. S. 307 and 308, section 505, that "the Fourteenth Amendment applies only to action by a state government. It does not apply to action by Congress, or action by a territory of the United States, an individual or private corporation, although within its application, may not infringe or violate it." (Emphasis supplied). See also 11 Am. Jur. 1098, section 311; 12 Am. Jur. 128, section 468; 12 Am. Jur. 133-134, section 471. Here we are concerned primarily with the application of the recent federal civil rights legislation designed to prevent discrimination and segregation of citizens of the United States, with the aid of state legislation in some cases, on account of race, color, religion or national origin.

The Supreme Court of the United States in *Nixon v. Herndon*, 273 U. S. 536, text 541, 47 S. Ct. 446, 71 L. ed. 759, text 761, speaking through Mr. Justice Holmes, said that the Fourteenth Amendment, "While it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them." In this case the court, quoting from *Buchanan v. Warley*, 245 U. S. 60, text 77, 38 S. Ct. 16, 2 L. ed. 149, text 161, said that the said Fourteenth Amendment "not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws . . . What is this but de-

claring that the law in the states shall be the same for the black as well as the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them *by law because of their color.*" (Emphasis supplied). In *Maxwell v. Dow*, 170 U. S. 581, text 593, 20 S. Ct. 448, 44 L. ed. 597, text 601, the Court remarked that "the primary reason for that (fourteenth) amendment was to secure the full enjoyment of liberty to the colored race is not denied; yet it is not restricted to that purpose, and it applies to everyone, white or black, that comes within its provisions." In the *Slaughter-House cases*, 83 U. S. 36, text 73, 21 L. ed. 394, text 407 and 408, the Court stated that the main purpose of the Fourteenth Amendment "was to establish the citizenship of the negro can admit of no doubt." In this case (83 U. S. text 81, 21 L. ed. text 410) the Court further remarked that "the existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by which such laws are forbidden." All of these cases were decided prior to January 1, 1938; this being true, no Justice of the Supreme Court sitting today took part in any of them.

In *Rice v. Sioux City Cemetery*, 349 U. S. 70, text 72, 75 S. Ct. 614, 99 L. ed. 897, the Court remarked that "only if a state deprives any person or denies him enforcement of a right guaranteed by the Fourteenth Amendment

can its protection be invoked." In *Peterson v. Greenville*, 373, U. S. 244, text 247, 83 S. Ct. 1119, 10 L. ed. 2d. 323, text 326, the Court said that "it cannot be disputed that under our decisions 'private conduct abridging individual rights does not violate the equal protection clause unless to some significant extent the state in any of its manifestations has found to have become involved in it.'" In *Burton v. Wilmington Parking Authority*, 365 U. S. 715, text 50, 81 S. Ct. 865, 6 L. ed. 2d. 45, text 50, the Court, quoting from the Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. ed. 835, stated that "the action inhibited by the first section (equal protection clause) of the Fourteenth Amendment is only such action as may fairly be said to be that of the states. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful . . . that private conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it" To the same general effect see also *Cooper v. Aaron*, 358 U. S. 1, text 17 and 18, 78 S. Ct. 1401, 3 L. ed. 2d. 5, text 16.

From the above and foregoing it appears that the Fourteenth Amendment to the Constitution of the United States deals with State and not individual action. Under this amendment no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; deprive any person of life, liberty or property without due process of law, or deny any person within its jurisdiction the equal protection of the law.

These prohibitions are against the several states, *not against the citizens and residents* themselves. Disregarding for the present the effect of the commerce clause of the United States Constitution, (paragraph 3, section 8, Article I, of the United States Constitution) the United States Constitution does not prohibit the operation of a business facility by a person, firm or corporation, wherein there is discrimination or segregation of patrons or customers based on race, color, religion or national origin. However, the state and its officers are prohibited by the said Fourteenth Amendment from enforcing or assisting in the enforcement of such discrimination or segregation. Such owners of such business facilities would be unable to call upon the public officers of the state, county or municipality to assist them in the enforcement of such discrimination or segregation. The acts here complained of as producing discrimination or segregation, or both, are action by the owners of the motel, restaurant and lounge, not action by the State of Georgia or under its authority. The action alleged in this case to produce discrimination or segregation, or both, is action by persons, firms or corporations, not action by the State of Georgia or under its authority. No showing is made in this case that the State of Georgia has made, or is enforcing, any law which abridges or adversely affects the privileges or immunities of citizens of the United States, or is depriving any person of life, liberty, or property without due process of law.

SECOND QUESTION:

ARE THE PROVISIONS OF SAID TITLES II AND

III OF SAID PUBLIC LAW 88-352, RELATING TO DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION BY THE OPERATORS OF SUCH PLACES, VALID AND CONSTITUTIONAL UNDER THE PROVISIONS OF SECTION 8, ARTICLE I, OF THE UNITED STATES CONSTITUTION RELATING TO COMMERCE WITH FOREIGN NATIONS, AMONG THE STATES AND WITH INDIAN TRIBES?

Section 8, Article I, of the United States Constitution, insofar as it relates to commerce is as follows:

"The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states and with the Indian tribes . . . and; To make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . ."

Section 1 of the Fourteenth Amendment to the United States Constitution provides that no state

"shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

These constitutional provisions appear to have been the basis for subsections (b) and (c) of Section 201 of Public

Law 88-352 of the United States, which subsections provide as follows:

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title *if its operations affect commerce*, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel or other establishment which provides lodging to *transient guests* other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in *selling food for consumption on the premises*, including but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theatre, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself

out as serving patrons of such covered establishment. (C) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country. (Emphasis supplied).

From the above quoted portion of said section 201 of Public Law 88-352 it appears that said paragraphs (b) and (c) of said section 201, and their operation, are de-

pendent upon *operation under and within the commerce clause* of the United States Constitution, or upon discrimination or segregation *supported by state action so as to be within the Fourteenth Amendment*. The application and operation of the Fourteenth Amendment was discussed in our first question above, which will not be repeated here.

Where places of public accommodation are located in airports, bus stations, railroad stations, and the like, and are primarily engaged in furnishing accommodations to persons traveling on aircraft, trains, busses, and like and similar means of transportation, it appears, from cases cited in note 164 of the annotations to Clause 3, Section 8, Article I, of the United States Constitution, prepared and published by the West Publishing Company and Edward Thompson Company, under the title of *United States Code Annotated*, that such accommodations become a part of such transportation so as to be part and parcel thereof so as to become a part of interstate commerce carried on by such aircraft, trains, busses and the like as means of interstate transportation and commerce. Here the motel, restaurant and other public facilities do not appear to be used as part and parcel of any such means of transportation or as an adjunct thereto, such as a restaurant operated in a railroad, bus, or air terminal.

We come next to the question of whether places of public accommodation, selling or serving gasoline or other motor fuels, preparing and serving meals, or selling commodities, which prior to such selling or serving had moved

in interstate commerce into the state to dealers within the state, who had in turn sold and delivered the same to such places of public accommodation, to be used for sale as aforesaid, are themselves engaged in interstate commerce so as to bring them within the purview of said clause 3, section 8, Article I, of the United States Constitution. For example, is Morrison's Cafeteria, located in Tallahassee, Florida, within said clause 3, Section 8, Article I, of the United States Constitution, merely because it uses groceries, meats, and other food products that were moved in interstate commerce, prior to their sale and delivery to the said cafeteria, in the preparation of their food and food products to be sold to customers in said cafeteria in Tallahassee, Florida. Stated in another way, does the Congress of the United States, under the power vested in it by said clause 3, Section 8, Article I, of the United States Constitution, "to regulate commerce . . . among the several states . . .," have authority to regulate the sale of such food by the said cafeteria, including the persons to whom such sales must be made.

The Court, in *Carter v. Carter Coal Company*, 298 U. S. 238, text 297, 56 S. Ct. 855, 80 L. ed. 1160, text 1182, concerning the said commerce clause of the United States Constitution, said that "in exercising the authority conferred by this clause of the Constitution, *Congress is powerless to regulate anything which is not commerce, as it is powerless to do anything about commerce which is not regulation . . . the power to regulate commerce embraces the instruments by which commerce is carried on.*" This poses the question of whether or not Morrison's Cafeteria,

in Tallahassee, Florida, is an instrumentality by which commerce is carried on "among the several states," or two or more of them, including Florida, as well as other service stations throughout the state and nation, purchase the gasoline, oil and other petroleum products sold by them, from distributors or wholesalers, who procure their supplies of gasoline, oil and other petroleum products from manufacturers located in other states and countries, the same moving in foreign or interstate commerce into Florida, before being sold by service stations to their customers. This poses the question of whether or not each such service station in Florida selling gasoline, oil and other petroleum products, is an instrumentality by which commerce is carried on "among the several states," or two or more of them, including Florida. Other examples may also be given to illustrate like transactions.

Even should we admit that the food products from which the meals served by Morrison's Cafeteria, in Tallahassee, Florida, were prepared and served, moved interstate before coming to rest in the cafeteria warehouse or kitchen, and that the gasoline, oil and petroleum products sold by service stations in Tallahassee, Florida, as well as elsewhere, moved interstate before coming to rest in the service station, service tanks and containers from which they were sold by the said service stations, we are confronted with the question of when did interstate commerce, or foreign commerce, as the case may be, cease and terminate; and whether or not the food sales by the cafeteria, and the gasoline, oil and other petroleum products sold by the service stations, were made in interstate commerce.

When does the interstate transportation of the food products, and the gasoline, oil and other petroleum products above-mentioned, begin and when does it terminate and come to rest? "Commerce begins when the movement of the product is actually begun. The mere intention of the shipper ultimately to send some of the goods beyond the state line does not in itself put them in interstate commerce, nor does preparatory gathering for that purpose at a depot or yard constitute interstate commerce . . . , however, transportation begins when the merchandise has been placed in possession of a common carrier . . ." (15 C. J. S. 290 and 291, section 25). We are here concerned with the termination of the interstate movement of the food products and the gasoline, oil and other petroleum products above-mentioned, and whether such interstate movement terminates prior to the sale of the food and food products by the cafeteria to its customers; and whether prior to the sale of the gasoline, oil and other petroleum products to motorists. We here use the sale of the food products by the cafeteria, and of the gasoline, oil and petroleum products as examples to illustrate the problem before us; many other products sold at retail may also be used.

For the purpose of this brief we will not concern ourselves with the effect of breaks in commerce prior to the time the property moving in commerce comes to rest at its destination. Our primary concern is when the commerce, be it interstate or foreign, comes to rest and is no longer an item of commerce. "The regulatory power of Congress over interstate and foreign commerce does not attach until such intercourse begins, and, conversely, the

power of Congress ceases when interstate or foreign commercial intercourse ends." (11 Am. Jur. 18, section 17, *Carter v. Carter Coal Company*, 298 U. S. 238, text 309, 56 S. Ct. 855, 80 L. ed. 1160, text 1188; *Wabash Railroad Company v. Pearce*, 192 U. S. 179, text 188, 24 S. Ct. 231, 48 L. ed. 397, text 400). In 15 Am. Jur. 2d. 701 and 702, section 59, it is stated that:

"Interstate commerce ordinarily continues as such until it reaches the point where the parties originally intended that the movement should finally end. In other words, transportation usually is not complete until the shipment arrives at the point of destination and is there delivered. In addition, the return trip of an empty truck after delivery of a load in interstate commerce is incidental to its operations in interstate commerce.

"The interstate character of a shipment of goods terminates when it is delivered to a warehouse to be held until called for by the shipper, or by the buyer who ordered the goods but has the option of rejecting them, or, in the case of oil, when it is delivered to storage tanks for distribution to various points within the state, where the ultimate destination of the oil was not known when it was delivered into the storage tanks. Where gas is transported from another state, the interstate movement ends with the delivery of the gas to distributing companies; its subsequent sale

and delivery by these companies to their customers at retail are intrastate commerce, which is subject to state regulation. But the essential nature of the transportation of natural gas in pipelines into a state is not affected by the particular point at which, without arresting the movement of the gas to its intended destination, the title and custody of the gas passes to the purchasers."

In 15 Am. Jur. 2d 647 and 648, section 17, it is stated that:

"The powers over commerce not delegated to the federal government by the Constitution are reserved to the states. Thus, while the regulation of foreign and interstate commerce is exclusively within the power of Congress, the states retain exclusive control over that commerce which is completely internal, which is carried on between one person and another in a state, and which does not extend to or affect other states. As to such commerce, the states have plenary power and Congress has no right to interfere. A state law may not be struck down on the mere showing that its administration affects interstate commerce in some purely incidental way. State regulations otherwise valid cannot be attacked merely because they incidentally affect business activities carried on outside the state. And when the legislation of the state

is limited to internal commerce to such degree that it does not include even incidentally the subjects of interstate commerce, it is not rendered invalid because it may have some effect, which is neither direct nor substantial, on interstate commerce. Furthermore, a state may, in a proper case, regulate the intrastate activities of an instrumentality which is employed both in intrastate and interstate commerce."

"The regulatory power of Congress over interstate and foreign commerce does not attach until such intercourse begins; and, conversely, the power of Congress ceases when interstate or foreign commercial intercourse ends." (15 Am. Jur. 2d. 646, section 16). Articles of interstate commerce are not, because of their origin, entitled to permanent immunity from the exercise of state regulatory power, and when, by reason of the fact that interstate transportation has terminated, objects come within the sphere of state legislation, the state may exercise its independent judgment and prohibit that which Congress did not see fit to forbid." (15 Am. Jur. 2d. 648, section 17). In *Carter v. Carter Coal Company*, 298 U. S. 238, text 309, 56 S. Ct. 855, 80 L. ed. 1160, text 1188, this Court said, concerning the commerce clause of the federal constitution, that "the federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins." In *A. L. A. Schechter Poultry Corporation v. United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. 1570, text 1587, the poultry corporation trucked live poultry from outside of the state to its slaughterhouse mar-

kets in New York where it held the same at its said slaughterhouse markets for slaughter and local sale to retail dealers and butchers, who in turn sold directly to consumers. "Neither the slaughtering nor the sales by defendants were transactions in interstate commerce." Evidently they were intrastate transactions. The said opinion continues stating that the facts "afford no warrant for the argument that the poultry handled by the defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation."

In United States v. Yellow Cab Company, 332 U. S. 218, text 230 and 231, 67 S. Ct. 1560, 91 L. ed. 2010, text 2020, the Yellow Cab Company was engaged in the business of transporting persons by yellow cabs from the railroad stations in Chicago to their homes, offices, hotels, etc., and vice versa, when such persons had come into such railroad stations in many instances from other states. The question before this Court appears to have been whether or not the transportation of such persons from other states was continued by reason of the transportation thereof from the railroad stations to their homes, offices, hotels, etc., constituted a part of the interstate commerce commenced in other states. This Court held not, stating:

"We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly

cross no state lines; by ordinance, their service is confined to transportation 'between any two points within the corporate limits of the City.' None of them serves only railroad passengers, all of them being required to serve 'every person' within the limits of Chicago. They have no contractual or other arrangement with the interstate railroads. Nor are their fares paid or collected as part of the railroad fares. In short, their relationship to interstate transit is only casual and incidental."

"All that we hold here is that when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation. And a restraint on or monopoly of that general local service, without more, is not proscribed by the Sherman Act."

In Rubber Tire Wheel Company v. Goodyear Tire and Rubber Company, 232 U. S. 413, text 419, 34 S. Ct. 403, 58 L. ed. 663, text 667, in a patent infringement case, it was stated that the patented article "continues only so long as the commodity to which the right applies retains a separate identity. If that commodity is combined with other things in the process of the manufacture of a new commodity, the trade right in the original part as an article of commerce is necessarily gone, so that when other persons become manufacturers on their own behalf, assembling the various elements and uniting them so as to produce the patented device, a new article" is produced.

In Weigle v. Curtice Brothers Company, 248 U. S. 285, text 286-288, 39 S. Ct. 124, 63 L. ed. 242, text 249 and 250, it was held that the commerce clause did not prevent a state from prohibiting the sale of a product in that state which is permitted to move in interstate commerce by the federal laws. In this connection this Court said that "when objects of commerce get within the sphere of state legislation, the state may exercise its independent judgment and prohibit what Congress did not see fit to prohibit. When they get within that sphere is determined, as we have said, with the long established criteria." In this case it was held that although Congress may permit an article to move in interstate commerce that a state may prohibit the sale of such article after interstate commerce has come to an end.

In Pacific States Box and Basket Company v. White, 296 U. S. 176, text 184, 56 S. Ct. 159, 80 L. ed. 138, text 145, it was held that the commerce clause of the United States Constitution did not prevent a state prohibiting the use of containers, designed and manufactured for use in packing and transporting raspberries and strawberries, which had come into the stream of interstate commerce and had come to rest therein.

In Weigle v. Curtice Brothers Company, 248 U. S. 285, text 288, 39 S. Ct. 124, 63 L. ed. 242, text 250, this Court remarked that "when objects of commerce get within the sphere of state legislation, the state may exercise its independent judgment and prohibit what Congress did not see fit to forbid.

When they get within that sphere is determined, as we have said, by the long established criteria."

In Packer Corporation v. Utah, 285 U. S. 105, 52 S. Ct. 273, 76 L. ed. 643, text 648, this court said that a statute of Utah prohibiting the use of certain billboards in that state operated "wholly intrastate, beginning after the interstate movement of the poster has ceased."

Although food products may move into the warehouse or pantry of a restaurant or other place of public accommodation in the stream of interstate commerce, when the operator of such restaurant or other place of public accommodation takes such food products and prepares therefrom items of food to be served in such restaurant or other place of public accommodation, such foods cease to be in interstate commerce prior to their service to the customer. Such a restaurant, except those located in railroad stations, bus terminals and air terminals, and the like, and operated primarily for the serving of interstate travelers, is not engaged in interstate commerce.

Although a restaurant owner might purchase his meats in an out-of-state meat packing plant, his chickens and turkeys from another out-of-state producer, his flour, meal, etc., from an out-of-state miller, and other food products from other out-of-state dealers, having the same shipped to his said restaurant by interstate means of transportation, such products come to rest in his place of business before they are there processed and prepared for service to cus-

tomers in the restaurant, so that the sale and service of the same in the said restaurant would not constitute or be transactions in interstate commerce.

There would seem to be little distinction between the person operating the said restaurant and a person engaged in the operation of an ordinary motor vehicle gasoline and oil station, where such person purchases his gasoline, oil and other products from wholesalers, distributors, etc., which products are stored in the tanks and containers of the station operator for retail sale as and when customers appear and request to make purchases of said products.

From the above and foregoing we must conclude that the provisions of Titles II and III of the federal Civil Rights Act of 1964, the same being Public Law 88-352, relating to discrimination in places of public accommodation by the operators of such places, is not authorized by the provisions of Section 8, Article I, of the United States Constitution, relating to commerce with foreign nations, among the states and with Indian Tribes, except insofar as such places are operated in connection with some business, such as a railroad, bus line, or an air line, or other public transportation business, *having a direct connection with* interstate transportation. Businesses having nothing more than an incidental connection with interstate transportation, such as a restaurant serving the public generally which not be engaged in interstate commerce within the purview and intention of the commerce clause of the United States may at uncertain times serve an interstate traveler, would Constitution. Unless the facts in the cause show that the

Heart of Atlanta Motel, Inc., a corporation, is actually engaging in interstate commerce, or that its operation directly affects interstate commerce, then it is not subject to federal legislation based on the commerce clause of the United States Constitution. From the record before this court there appears to be no legal basis, on the facts and circumstances shown, for applying the Civil Rights Act of 1964, its operation not being within either the Fourteenth Amendment to the United States Constitution, or the Commerce clause of the said Constitution.

Respectfully submitted,

JAMES W. KYNES
Attorney General of Florida

FRED M. BURNS
Assistant Attorney General of Florida

JOSEPH C. JACOBS
Assistant Attorney General of Florida

CERTIFICATE OF SERVICE

I, FRED M. BURNS, Assistant Attorney General of Florida, one of the Attorneys for the State of Florida, and member of the Bar of the Supreme Court of the United States, hereby certify that on September 22, 1964, I served copies of the foregoing Amicus Curiae Brief of the State of Florida on each of the following parties and persons by depositing said copies in a United States Post Office or mail box, with first class or air mail postage prepaid and addressed as follows:

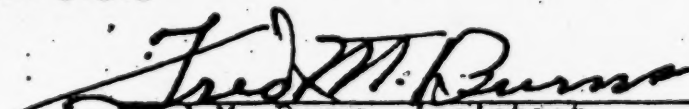
Honorable Burke Marshall
Assistant Attorney General
Justice Building
Washington, D. C.

Honorable St. John Barrett
Assistant Attorney General
Justice Building
Washington, D. C.

Honorable Charles L. Goodson
United States District Attorney
Atlanta, Georgia

Honorable Archibald Cox
Solicitor General
Office of the Solicitor General
Washington, D. C. 20530

Honorable Moreton Rolleston, Jr.
1103 Citizens and Southern Bank Building
Atlanta, Georgia 30303



Fred M. Burns, Assistant
Attorney General of Florida
CAPITOL Building
Tallahassee, Florida

LE COPY

Office Supreme Court, U.S.

FILED

SEP 28 1964

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1964

No. 515

HEART OF ATLANTA MOTEL, INC.,

Appellant,

against

THE UNITED STATES OF AMERICA ET AL.,

Respondents.

**BRIEF OF THE ATTORNEY GENERAL OF THE STATE
OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF
AFFIRMANCE**

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

SHIRLEY ADELSON SIEGEL
Assistant Attorney General
in Charge of Civil Rights Bureau
Of Counsel

INDEX

| | PAGE |
|--|------|
| Interest of the <i>Amicus</i> | 1 |
| Question Presented | 2 |
| Statute Involved | 2 |
| POINT I—Congress has found that practices of racial discrimination in furnishing lodgings to transient guests actually burden interstate commerce | 3 |
| POINT II—Congress has power under the commerce clause to outlaw racial discrimination by inns, hotels, motels and other establishments which provide lodging to transients | 6 |
| A. As to Racial Discrimination Against Travelers | 6 |
| B. As to Other Regulation Under the Commerce Clause | 8 |
| POINT III—The public accommodations provision violates neither the Fifth Amendment nor the Thirteenth Amendment | 9 |
| A. As to the Fifth Amendment | 9 |
| B. As to the Thirteenth Amendment | 11 |
| Conclusion | 12 |

CASES CITED

| | |
|--|----|
| Bell v. Maryland, decided by U. S. Sup. Ct. on June 22, 1964, opinion by Mr. Justice Douglas, App. V | 10 |
| Block v. Hirsh, 256 U. S. 135, 154 (1921) | 6 |
| Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28 (1948) | 11 |
| Boynton v. Virginia, 364 U. S. 454 (1960) | 7 |

| | PAGE |
|--|------|
| Civil Rights Cases, 109 U. S. 3 (1883) | 8 |
| Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines, Inc., 372 U. S. 714 (1963) | 11 |
| Communist Party v. Subversive Activities Control Board, 367 U. S. 1, 94 (1961) | 6 |
| District of Columbia v. John R. Thompson Co., 346 U. S. 100, 109 (1953) | 11 |
| Georgia, et al. v. United States, et al., 371 U. S. 9 (1962), affirming 201 F. Supp. 813 (N. D. Ga. 1961) | 7 |
| Henderson v. United States, 339 U. S. 816 (1950) | 7 |
| Hotel Employees Local 255 v. Leedom, 358 U. S. 99 (1958), reversing 101 App. D. C. 414, 249 F. 2d 506 (1957) | 8 |
| Kirschbaum Co. v. Walling, 316 U. S. 517 (1942) | 9 |
| Marcus Brown Co. v. Feldman, 256 U. S. 170 (1921) | 11 |
| Mitchell v. United States, 313 U. S. 80 (1941) | 7 |
| Railway Mail Association v. Corsi, 326 U. S. 88 (1945) | 11 |
| Slaughter-House Cases, 16 Wall. 36 (1873) at 68- 69, 72 | 11 |
| United States v. Darby, 312 U. S. 100, 118 (1941) | 9 |
| United States v. Rock Royal Co-operative, 307 U. S. 533, 569-70 (1939) | 11 |
| United States v. Yellow Cab Co., 332 U. S. 218 (1947) | 7 |
| Wickard v. Filburn, 317 U. S. 111 (1942) | 9 |

STATUTES CITED

| | PAGE |
|--|------|
| New York Executive Law, Sec. 290 | 2 |
| Civil Rights Act of 1964; Public Law 88-352, 78 Stat. 243 | 2 |
| Art. 1, Sec. 8, Clauses 3 and 18, United States Con- stitution | 6 |
| Interstate Commerce Act, §§ 3(1), 216(d), 49 U.S.C. §§ 3(1), 316(d) | 7 |
| Fair Labor Standards Act, 75 Stat. 71 (1961), 29 U.S.C. § 213(a)(2)(ii) | 9 |

MISCELLANEOUS

| | |
|--|------|
| U. S. Bureau of the Census, United States Census of Population: 1960 General Population Character- istics, New York. Final Report PC(1)-34B, Table 15 | 2 |
| H. R. Rep. No. 914, Pt. 2, 88th Cong., 1st Sess., pp. 7-11 | 4, 5 |
| Outdoor Recreation for America (January 1962) .. | 4 |
| Blackstone's Commentaries on the Laws of England (Harper & Bros., New York 1854, based on 21st London Ed.), Vol. III, Ch. IX, p. 165 | 10 |
| H. Doc. 124, 88th Cong., 1st Sess. | 10 |
| H. R. Rep. No. 914, 88th Cong., 1st Sess., p. 18 | 5 |

Supreme Court of the United States

OCTOBER TERM, 1964

No. 515

HEART OF ATLANTA MOTEL, INC.,

Appellant,

against

THE UNITED STATES OF AMERICA *et al.*,

Respondents.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

Interest of the *Amicus*

The State of New York has a vital interest in the outcome of this litigation over the constitutionality of the Civil Rights Act of 1964, notably Title II pertaining to public accommodations.

New York has an immediate and specific interest as *parens patriae* with respect to the many Negroes who are New York citizens. They are protected under the laws of this State against discrimination in places of public accommodation, but their ability to move freely in certain other parts of the country for pleasure or business has been impeded by discrimination and segregation because of their race and color. In 1960, out of an aggregate New York State population of 16,782,304 persons, 8.4% or 1,417,511 were Negro. U. S. Bureau of the Census, *United States*

*Census of Population: 1960. General Population Characteristics, New York. Final Report PC (1)-34B, Table 15.**

Beyond its specific interest as *parens patriae* as to Negro New Yorkers, New York State has a stake in the future of America. The widespread protest against segregation and discrimination in public places has been heard throughout the world. The demoralization of our national will that may result from racial unrest is a threat to our security as a free nation and to our prosperity. As well expressed in the New York law, "practices of discrimination . . . because of race, creed, color or national origin . . . menace[s] the institutions and foundation of a free democratic state." New York Executive Law, sec. 290. If the national government should be impotent to cope with this crisis, the consequences will be serious for all of us.

Question Presented

May Congress lawfully regulate under the commerce clause practices of racial discrimination by a motel which provides lodging to transient guests from out-of-state?

Statute Involved

Civil Rights Act of 1964, Public Law 88-352, 78 Stat. 243.

"TITLE II—INJUNCTIVE RELIEF AGAINST DISCRIMINATION
IN PLACES OF PUBLIC ACCOMMODATION

"Sec. 201(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities

* While the following brief is directed to the problem of discrimination against Negroes, which is at issue in the present case, the statute properly extends protection to all minorities, whether racial, religious or national.

The census table referred to in the text shows that the "non-white" population of New York State in 1960 was 1,495,233, or 8.9% of the total population.

ties, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

“(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

“(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

• • •

“(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); • • • For purposes of this section, ‘commerce’ means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.”

POINT I

Congress has found that practices of racial discrimination in furnishing lodgings to transient guests actually burden interstate commerce.

In adopting Title II, Congress acted with full knowledge of conditions of discrimination and segregation in places of public accommodation and of public unrest over these

conditions. Presidential messages, hearings and debates over the period of a year established the existence of a widespread social evil.

In the ample legislative history which documents the reasons that led Congress to act, reference need be made only, for brevity's sake, to certain testimony and information received by the Senate Commerce Subcommittee as described to the House of Representatives, H. R. Rep. No. 914, Pt. 2, 88th Cong., 1st Sess., pp. 7-11. Thus, an official of the National Association for the Advancement of Colored People gave poignant testimony to the human problem of Negro families traveling by car, weary as they drive on, past vacancy signs at motels, until they reach a town or city where they have friends (*id.* at pp. 7-8). The Subcommittee was furnished a table by officials of the United States Commerce Department revealing the distances between certain cities that a Negro must travel to find lodging of reasonable quality (*id.* at p. 9, Table I). Statistical evidence was also furnished showing the imbalance between Negroes and whites (within the same income class) in expenditures for automobile operations, an imbalance particularly marked in areas where places of public accommodation are widely segregated (*id.* at p. 11, Table II). The point need not be labored that travel over large distances is a hallmark of the American way of life.*

Also, testimony was presented before the House Judiciary Subcommittee by an official of the International Brotherhood of Teamsters that Negro truckdrivers are not sent on overnight trips in certain regions because of a lack

* In this connection, it may be noted that the Outdoor Recreation Resources Review Commission in its Report to the President and the Congress, *Outdoor Recreation for America* (January 1962), found that "driving for pleasure" was the most popular outdoor activity for Americans as a whole (*id.* at p. 3); and in surveys made for the Commission by the University of Michigan it was ascertained that 27 per cent of all vacation trips taken by Americans in 1959-60 involved more than 1000 miles of travel one way (Appendix F, Table 14, *id.* at p. 217).

of rest accommodations (*id.* at p. 10). The implications are clear: opportunities of dark-skinned Americans to obtain certain kinds of employment or to engage in certain businesses have been limited by their predictable difficulty of access to places of public accommodation.

The Stipulation of Facts in the case at bar dramatically illustrates the scope of denial of motel accommodations to interstate travelers who are Negro (Record, p. 17). Through various national advertising media, including magazines having national circulation, the appellant solicits patronage for its motel from outside the State of Georgia (*ibid.*). Appellant maintains over fifty billboards and highway signs advertising the motel on highways in Georgia (*ibid.*). It was stipulated that approximately 75% of the total number of guests who register at appellant's motel, which has 216 rooms for lease or hire to transients, are from outside the State of Georgia (*ibid.*) (italics supplied); and the Complaint alleges (para. 6, Record, p. 7) that appellant's motel has never rented sleeping accommodations to Negroes.

In submitting the bill which became the Civil Rights Act of 1964, the House Committee on the Judiciary made this general statement (H. R. Rep. 914, 88th Cong., 1st Sess., p. 18):

"* * * national legislation is required to meet a national need which becomes ever more obvious. That need is evidenced, on the one hand, by a growing impatience by the victims of discrimination with its continuance and, on the other hand, by a growing recognition on the part of all of our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated * * *

[H.R. 7152] would make it possible to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public."

Thus, in Title II of the Civil Rights Act of 1964, Congress found that practices of inns, hotels, motels and other establishments lodging transient guests which deny full and equal enjoyment of their facilities to all persons, withholding such enjoyment from some through discrimination or segregation on the ground of race, color, religion or national origin, constitute a burden upon "travel, trade, traffic, commerce, transportation" and "communication" between the states.

Any declaration by Congress concerning public conditions that by necessity and duty it must know is entitled at least to great respect. *Block v. Hirsh*, 256 U. S. 135, 154 (1921). Particular weight is given by this Court to legislative findings which are supported by extensive investigations by Committees of Congress. *Communist Party v. Subversive Activities Control Board*, 367 U. S. 1, 94 (1961).

POINT II.

Congress has power under the commerce clause to outlaw racial discrimination by inns, hotels, motels and other establishments which provide lodging to transients.

Article I, § 8, clause 3 of the Constitution confers upon Congress the power "to regulate commerce among the several states . . ." and under clause 18, "to make all laws necessary and proper for carrying into execution the foregoing powers."

A. As to Racial Discrimination Against Travelers

Relying upon the commerce clause, this Court has consistently protected interstate travelers from denial of equal treatment because of their race or color. Protecting the traveler's right to lodging irrespective of his race, creed, color or national origin is not different in principle.

Interstate Commerce Act § 3(1), 49 U.S.C. § 3(1), prohibiting discrimination against passengers, has been applied to ensure equal treatment irrespective of race or color under a variety of situations, irrespective of local law or custom. E.g., *Mitchell v. United States*, 313 U. S. 80 (1941) (railroad Pullman); *Henderson v. United States*, 339 U. S. 816 (1950) (railroad dining car); *Georgia et al. v. United States et al.*, 371 U. S. 9 (1962), *affirming* 201 F. Supp. 813 (N. D. Ga. 1961) (involving Interstate Commerce Act § 216(d), 49 U.S.C. § 316(d), the non-discrimination provision affecting motor carriers).

In the last cited case, the State of Georgia objected to an order by the Interstate Commerce Commission that no motor carrier subject to its jurisdiction shall operate a vehicle in interstate commerce on which the seating of passengers is based on their race or operate terminal facilities on a similar basis. Georgia contended that the effect of the order was to regulate local commerce, since the same vehicles and terminal facilities were used for both intrastate and interstate passengers and it was not economically feasible to make a separation. It was held that the intrastate effect was incidental, and the order was upheld.

The national government's commerce power has also been effective in giving the traveler a legal right to use restaurant facilities in a bus terminal used by interstate buses, notwithstanding local law and custom upholding racial segregation. *Boynton v. Virginia*, 364 U. S. 454 (1960).

There is no authority to the contrary. Even in *United States v. Yellow Cab Co.*, 332 U. S. 218 (1947), which has been cited as a contrary holding, this Court warned that local taxicab service to and from a railroad station where interstate journeys begin and end might have sufficient effect upon interstate commerce to justify imposition of federal laws resting on the commerce power (*id.*, pp. 232-233). In the *Yellow Cab* case, the taxis merely conveyed

interstate passengers between their homes and the railroad station in the normal course of operating an independent local taxi service that was not an integral part of interstate transportation, and this Court held that a restraint on such a general local service, without more, is not proscribed by the Sherman Act. Here we have an entirely different situation, since Congress has found specifically that the lodging of transients on a discriminatory basis affects interstate commerce.

The *Civil Rights Cases*, 109 U. S. 3 (1883), are not in point since a different section of the Constitution was in issue. It was not contended that the Civil Rights Act of 1875, which contained a public accommodations provision similar to section 201(a) of the 1964 Act, rested upon the commerce clause.

B. As to Other Regulation Under the Commerce Clause

Apart from the law on interstate passengers as such, Congress has ample power under the commerce clause to outlaw racial discrimination by inns, hotels, motels and other establishments which provide lodging to transients from out of state. This Court has repeatedly upheld the power of Congress to enact legislation which is designed to eliminate causes of obstruction to the free flow of interstate commerce whether or not the regulated activity is itself interstate in character or, in any individual case, has a substantial effect on commerce.

Notable examples of Congressional exercise of the commerce power over activities not in themselves interstate in character are provided in the field of labor law. Specifically, labor relations and labor standards at a motel are within the reach of the commerce power. As to the National Labor Relations Act, the case in point is *Hotel Employees Local 255 v. Leedom*, 358 U. S. 99 (1958), reversing 101 App. D. C. 414, 249 F. 2d 506 (1957). As to the Fair Labor Standards Act, which expressly exempts hotels,

75 Stat. 71 (1961), 29 U.S.C. § 213(a)(2)(ii), compare *United States v. Darby*, 312 U. S. 100, 118 (1941); *Kirschbaum Co. v. Walling*, 316 U. S. 517 (1942).

Wickard v. Filburn, 317 U. S. 111 (1942), demonstrates the reach of the commerce power to apparently local and minuscule activity (here under the Agricultural Adjustment Act), which has an impact on interstate commerce only through the aggregate of all such local and minuscule activities. The record in the instant case shows that appellant's activity is primarily and substantially interstate in effect (Stipulation of Facts, Record, p. 17). Therefore, *a fortiori* the practices of the appellant are subject to regulation under the commerce power.

POINT III

The public accommodations provision violates neither the Fifth Amendment nor the Thirteenth Amendment.

A. As to the Fifth Amendment

The contention that § 201(a), making it unlawful for establishments providing lodging to transient guests to discriminate because of race, creed, color or national origin, violates the Fifth Amendment, is wholly without foundation.

Obviously, every regulatory enactment of the states as well as of the Congress involves some loss of freedom. The appellant's Complaint admits that the use of its land is subject to restriction by health and zoning laws (para. 8, Record, p. 8). All the regulations by Congress under the commerce power referred to in Point II involved a correlative loss of freedom, such as, the businessman's freedom to refuse to bargain with representatives of his employees' own choosing. The Civil Rights Act of 1964 only deprives operators of public places catering to transients

of the freedom to deny their accommodations to a segment of the public, a so-called freedom that innkeepers never had under the common law. *Blackstone's Commentaries on the Laws of England* (Harper & Bros., New York 1854, based on 21st London ed.), Vol. III, Ch. IX, p. 165.

The true issue is whether Congress acted arbitrarily and capriciously in finding that racial discrimination by motels affected commerce and whether the provisions of Title II are reasonable and appropriate to eliminate the evil which Congress found to exist. The appellant's parade of horrors which it labels "interstate commerce by infection" provides extreme hypothetical examples of regulation in the absence of any demonstrated evil, the exact opposite of what we have in the present record.

In fact, there is nothing novel or impractical about legislation against racial discrimination by places of public accommodation. Such laws have been in effect in this country for a century. New York's own experience with this legislation dates back over 80 years. President Kennedy in his message to Congress requesting enactment of a civil rights bill referred to some 30 states, the District of Columbia and numerous cities "covering some two-thirds of this country and well over two-thirds of its people" which had already enacted laws against discrimination in places of public accommodation. H. Doc. 124, 88th Cong., 1st Sess. Cf. *Bell v. Maryland*, decided by this Court on June 22, 1964, Opinion by Mr. Justice Douglas, Appendix V, prepared by the United States Commission on Civil Rights, tabulating state anti-discrimination laws as of March 18, 1964.

These local laws have worked well. From the experience of New York State, of which this *amicus* has personal knowledge, it is evident that such legislation is reasonable and has resulted in no impairment of private property nor of individual liberties.

It is clear that state and local anti-discrimination laws do not violate the due process clause of the Fourteenth Amendment. *Railway Mail Association v. Corsi*, 326 U. S. 88 (1945); also, *Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines, Inc.*, 372 U. S. 714 (1963); *District of Columbia v. John R. Thompson Co.*, 346 U. S. 100, 109 (1953); *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28 (1948). The Federal legislation based upon the commerce clause is no more subject to attack under the due process clause of the Fifth Amendment than are such state enactments under the Fourteenth Amendment. As observed in *United States v. Rock Royal Co-operative*, 307 U. S. 533, 569-70 (1939):

“The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce.”

B. As to the Thirteenth Amendment

The most semantical and spurious of appellant's arguments is the contention that Title II of the Civil Rights Act of 1964 violates the Thirteenth Amendment. Again, as with respect to the argument relating to the Fifth Amendment, it is inevitable that governmental regulation of whatever character may restrict someone's personal freedom to do and associate as he pleases, but it does not follow that every such restriction gives rise to an involuntary servitude.

The kind of coercive personal labor against which the Thirteenth Amendment was directed has no relevance here. Compare *Marcus Brown Co. v. Feldman*, 256 U. S. 170 (1921). The admonition of this Court in the *Slaughter-House Cases*, 16 Wall. 36 (1873) at 68-69, 72, that we must be mindful of the historic purpose of the Amendment, which was to forbid conditions such as the slavery of the Negroes that ante-dated the Civil War, is sharp. The

Thirteenth Amendment, adopted as a protection for the former slaves, would, if appellant's argument were to prevail, be used to enslave them..

CONCLUSION

The decision of the Court below that Title II, § 201(a), (b)(1) and (c) of the Civil Rights Act of 1964 is valid and constitutional should be affirmed.

Dated: New York, N. Y., September 25, 1964.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

SHIRLEY ADELSON SIEGEL
Assistant Attorney General
in Charge of Civil Rights Bureau
Of Counsel

Sup

No. 512

092

March 10, 1914

Mr. J. H. [illegible]

[illegible]

[illegible]

Table of Contents.

| | |
|--|----|
| I. Position of the amicus curiae | 1 |
| II. The relevant statute and constitutional provisions | 2 |
| III. The issues and summary of argument | 4 |
| IV. Argument | 7 |
| 1. Not simply trade, but all, intercourse which affects the states generally is subject to the scrutiny of Congress under the Commerce Clause | 7 |
| 2. Racial discrimination, when in interstate commerce no less than other aspects of the public well-being, falls within the purview of the Commerce Clause | 11 |
| 3. The congressional determination that the types of business described in section 201(b)(1), affect commerce is fully justified | 14 |
| 4. The constitutionality of the state action portion of subsection (b) of section 201, as defined in subsection (d), is clear | 20 |
| 5. Section 201(b)(1) of the Civil Rights Act of 1964 does not offend the Due Process Clause of the Fifth Amendment | 21 |
| Conclusion | 26 |

Table of Authorities Cited.

CASES.

| | |
|--|-----|
| Adkins v. Children's Hospital, 261 U.S. 525 | 9n. |
| Bailey v. Patterson, 369 U.S. 31 | 20 |
| Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511 | 8 |

| | |
|---|------------|
| Barrows v. Jackson, 346 U.S. 249 | 23 |
| Board of Trade of Chicago v. Olsen, 262 U.S. 1 | 16 |
| Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 | 18 |
| Boynnton v. Virginia, 364 U.S. 454 | 13 |
| Brooks v. United States, 267 U.S. 432 | 11 |
| Brown v. Board of Education of Topeka, 349 U.S. 294 | 20 |
| Caminetti v. United States, 242 U.S. 470 | 11, 17 |
| Carter v. Carter Coal Co., 298 U.S. 238 | 9, 15. |
| Civil Rights Cases, 109 U.S. 3 | 5, 25 |
| Colorado Anti-Discrimination Commission v. Conti- nental Air Lines, Inc., 372 U.S. 714 | 17 |
| Councill v. Western & Atlantic Railroad, 1 I.C.C. 339 | 13 |
| Crawford v. Robert L. Kent, Inc., 341 Mass. 125 | 25 |
| Currin v. Wallace, 306 U.S. 1 | 14 |
| Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 | 19 |
| Dawson v. Mayor & City Council of Baltimore City, 220 F. 2d 386 | 23 |
| Day-Brite Lighting, Inc., v. Missouri, 342 U.S. 421 | 16 |
| District of Columbia v. John R. Thompson Co., Inc., 346 U.S. 100 | 20, 21 |
| Edwards v. California, 314 U.S. 160 | 12 |
| Fitzgerald v. Pan American World Airways, Inc., 229 F. 2d 499 | 13 |
| Gibbons v. Ogden, 9 Wheat. 1 | 9, 10, 20 |
| Gooch v. United States, 297 U.S. 124 | 17 |
| Hall v. DeCuir, 95 U.S. 485 | 11, 12, 17 |
| Hammer v. Dagenhart, 247 U.S. 251 | 9n. |

TABLE OF AUTHORITIES CITED

iii

| | |
|--|----------------|
| Henderson v. United States, 339 U.S. 816 | 13 |
| Hipolite Egg Co. v. United States, 220 U.S. 45 | 14 |
| Hoke v. United States, 227 U.S. 308 | 10, 11 |
| Holland v. Edwards, 307 N.Y. 38, 119 N.E. 2d 581 | 25 |
| Holmes v. Atlanta, 223 F. 2d 93 | 23 |
| Houston, East & West Texas Railway Co. v. United States, 234 U.S. 342 | 9 |
| Jacobson v. Massachusetts, 197 U.S. 11 | 22 |
| Levitt & Sons, Inc., v. Division Against Discrimination, 31 N.J. 514, 158 A. 2d 177 | 24, 25 |
| Lombard v. Louisiana, 373 U.S. 267 | 5, 20 |
| Lottery Case, 188 U.S. 321 | 9, 20 |
| Massachusetts Commission Against Discrimination v. Colangelo, 344 Mass. 387, 182 N.E. 2d 595 | 25 |
| Minnesota Rate Cases, The, 230 U.S. 352 | 8, 10 |
| Mitchell v. United States, 313 U.S. 80 | 13 |
| Morgan v. Virginia, 328 U.S. 373 | 11, 12, 17, 25 |
| National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 | 10, 14, 21 |
| Nebbia v. New York, 291 U.S. 502 | 22 |
| New Orleans City Park Improvement Association v. Detiege, 252 F. 2d 122 | 23 |
| North American Co. v. Securities & Exchange Commission, 327 U.S. 686 | 14 |
| Opinion of the Justices, 247 Mass. 589 | 25 |
| Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. 1 | 10 |
| Peterson v. Greenville, 373 U.S. 244 | 5 |
| Prudential Insurance Co. v. Benjamin, 328 U.S. 408 | 14 |
| Railway Mail Association v. Corsi, 326 U.S. 88 | 23, 24 |

| | |
|--|-------------------|
| Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U.S. 453 | 14 |
| Second Employers' Liability Cases, 223 U.S. 1 | 14 |
| Shelley v. Kraemer, 334 U.S. 1 | 23 |
| Slack v. Atlantic White Tower Systems, Inc., 284 F. 2d 746 | 18 |
| Stafford v. Wallace, 258 U.S. 495 | 16 |
| Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 | 14 |
| Swift & Co. v. United States | 10 |
| United States v. Carolene Products Co., 304 U.S. 144 | 16, 20 |
| United States v. Darby, 312 U.S. 100 | 9n., 14, 20 |
| United States v. Jackson, 318 F. 2d 1 | 13 |
| United States v. Simpson, 252 U.S. 465 | 10 |
| United States v. South-Eastern Underwriters Association, 322 U.S. 533 | 8, 10, 11, 14, 18 |
| Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515 | 14 |
| West Coast Hotel Co. v. Parrish, 300 U.S. 379 | 9n., 22 |
| Wickard v. Filburn, 317 U.S. 111 | 9, 14, 17, 18 |
| Williams v. Howard Johnson's Restaurant, 268 F. 2d 845 | 18 |
| Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 | 16 |

STATUTES, &c.

| | |
|--|------------------|
| Constitution of the United States, Commerce Clause, Art. I, § 8, cl. 3 | 4, 5, 6, 7, 8, 9 |
| Constitution of the United States, Fifth Amendment | 6 |

TABLE OF AUTHORITIES CITED

v

| | |
|--|------------------------|
| Constitution of the United States, Thirteenth through Fifteenth Amendments | 5 |
| Constitution of the United States, Fourteenth Amendment, § 1 | 4 |
| Constitution of the United States, Fourteenth Amendment, § 5 | 4, 5 |
| Civil Rights Act of 1875 | 5 |
| Public Law 88-342, Civil Rights Act of 1964, § 201 | 1, 2, 3, 4, 14, 20, 24 |
| 24 Stat. 380, 49 U.S.C. § 3(1) | 13, 19 |
| Alaska Comp. Laws Ann. §§ 20-1-34 | 25 |
| Idaho Code Ann. §§ 18-1701-03 | 25 |
| Maine Rev. Stat. Ann. c. 137, § 50 | 25 |
| Mass. Fair Housing Practices Law | 25 |
| Mass. G.L. c. 272, §§ 92A, 98 | 1 |
| Mass. Stat. 1865, c. 277 | 1, 25 |
| Mont. Rev. Code Ann. § 64-211 | 25 |
| N. Dak. Cent. Code § 12-22-30 | 25 |
| N.H. Rev. Stat. Ann. c. 354 | 25 |
| N.M. Stat. Ann. 49-8-1-6 | 25 |
| Ore. Rev. Stat. §§ 30, 670-680 | 25 |
| Vt. Stat. Ann. tit. 13 §§ 1451-52 | 25 |
| Wyoming Laws, 1961, c. 103 | 25 |

MISCELLANEOUS.

| | |
|--|---|
| Madison's Debates, H.R. Doc. No. 398, 69th Cong., 1st Sess., 1929, 117 | 7 |
|--|---|

Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 515.

HEART OF ATLANTA MOTEL, INC.,

v.

UNITED STATES.

BRIEF OF EDWARD W. BROOKE,
ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS,
AS AMICUS CURIAE IN SUPPORT
OF THE UNITED STATES.

I. Position of the Amicus Curiae.

By letter to the National Association of Attorneys General dated August 26, 1964, the Clerk of this Court notified all Attorneys General of the instant litigation, and invited them to submit briefs *amicus curiae* on the constitutional issue involved. Massachusetts was the first state in the nation to pass a "public accommodations" statute, Mass. Stat. 1865, c. 277, which, as amended, survives today. G.L. c. 272, §§ 92A, 98. The Massachusetts statute is similar in purpose and design to section 201 of the Civil Rights Act of 1964, the constitutionality of which is challenged in this litigation. It is the opinion of this *amicus curiae* that a holding that section 201 is unconstitutional could

cast a serious cloud on the validity of the similar statutes in Massachusetts and in many other states; and that such a holding would be legally indefensible. It is, accordingly, the obligation and privilege of the *amicus* to respond affirmatively to the invitation. This *amicus* has not received a record of the case at bar. Accordingly he will not comment on the facts or the proceedings therein. To the contrary, he will direct his arguments solely to the question whether section 201, on its face, is unconstitutional. It is the position of this brief that the section is constitutional.

II. The Relevant Statute and Constitutional Provisions.

Section 201 of Public Law 88-342, the Civil Rights Act of 1964, reads in part as follows:

"SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

"(1) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

“(4) Any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

“(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b) . . . ; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, “commerce” means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

“(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

“(e) The provisions of this title shall not apply to a private club or other establishment not in fact open

to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

The purported bases of jurisdiction are Article I, § 8, cl. 3 (the Commerce Clause), and section 5 of the Fourteenth Amendment to the Constitution. The former provision reads:

“The Congress shall have Power . . . to regulate Commerce . . . among the several States . . .”

The latter provision reads:

“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

The relevant provision appears in section 1:

“ . . . nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.”

Section 201 will be tested against the provision of the following Fifth Amendment:

“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”

III. The Issues and Summary of Argument.

Congress clearly sought to legislate only pursuant to the authority granted in part by the Commerce Clause and

in part by the Fourteenth Amendment. No such limiting principle appeared in the Civil Rights Act of March 1, 1875, which read, in relevant part:

"That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law; and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." 18 Stat. 335.

This statute was held invalid in the *Civil Rights Cases*, 109 U.S. 3 (1883). The policy it sought to enunciate reached far beyond the power of Congress under the Thirteenth through Fifteenth Amendments. The principal holding of the case—that the Fourteenth Amendment prohibits only "state action"—has been reaffirmed by this Court on each occasion on which it has been called into question, and as recently as in the last Term. *Peterson v. Greenville*, 373 U.S. 244 (1963). *Lombard v. Louisiana*, 373 U.S. 267 (1963). The *Civil Rights Cases* did not consider the statute before it under the Commerce Clause, "as the sections in question are not conceived in any such view." 109 U.S. at 19.

The question before the Court is whether the effort of Congress to contain its legislation within the prescribed bounds was successful. It is, in this respect, noteworthy that Congress did not merely incorporate the constitutional limitations by reference. Subsections (b)(1) and (c)(1) provide in effect that any place for the lodging of transient guests (with the exceptions

set forth) *ipso facto* falls within the jurisdiction of the Commerce Clause. Similarly in subsection (d) Congress defines "state action" which will permit its exercise of jurisdiction.

The Commerce Clause is a major bulwark of our federal system. It authorizes central policy-making in matters which are not local in nature. That the effects of racial discrimination can be burdensome to the national interest has long been recognized. State laws which impose a burden on commerce are themselves in conflict with the power of Congress and are invalid. In addition, Congress has affirmatively regulated private carriers to insure uniform racial policies in interstate travel since 1887. Congress's conclusions must be sustained if any set of facts can rationally be presumed which will support them. Congress might well have found that the burdens on interstate commerce by discrimination do not cease when the carrier's passenger leaves the terminal; or because the citizen decides to travel by automobile. It might also have found that discrimination enervates the whole community and leads to economic stagnation or isolation.

All of the activities described in subsection (d) of the Act have been held to constitute "state action." In effect, this subsection merely incorporates the Equal Protection Clause, with its judicial gloss, into the statute.

The Act does curtail a prior existing "liberty" to discriminate in the conduct of business. All law does likewise. The particular liberty, however, is irrational and runs counter to national policy. An act does not offend the Fifth Amendment when it is designed to serve a legitimate end and chooses means to do so which are not arbitrary or capricious.

IV. Argument.

1. NOT SIMPLY TRADE, BUT ALL INTERCOURSE WHICH AFFECTS THE STATES GENERALLY IS SUBJECT TO THE SCRUTINY OF CONGRESS UNDER THE COMMERCE CLAUSE.

A simplistic reading of the word "commerce" would limit its meaning to traffic, trade, the flow of commodities and similar business enterprises. Yet such a reading would reflect neither the intention of the draftsmen of the clause nor its century and a half of development by judicial interpretation.

The original resolution at the Constitutional Convention, from which the Commerce Clause emerged, granted the Congress power to legislate in all cases where "The harmony of the United States may be interrupted by the exercise of individual legislation." Madison's Debates (as reported in H.R. Doc. No. 398, 69th Cong., 1st Sess., 1929), 117. This Resolution was unanimously approved. *Id.* at 129-130. A counter-proposal, intended to limit Congressional power to matters more closely related to business, was defeated. *Id.* at 234. The final resolution, containing the language of the original resolution, was sent to the Committee on Detail (*id.* at 390, 465), whence it was reported out substantially in the form of Article I, § 8, cl. 3, of the Constitution, and thereupon passed without debate. *Id.* at 495.

To hold that the clause changed its meaning in the Committee on Detail to one which the Convention itself had previously rejected, and, further, that the Convention then, without debate, approved the change, would attribute to the members of the Committee disingenuousness and guile, and to the Convention members a blind acquiescence which affronts credulity. The only plausible explanation of the drafting changes is that the Committee sought to

reduce to language appropriate for a legal document the philosophy approved by the Convention.

So viewed, the Commerce Clause represents not merely a grant of technical, regulatory powers over interstate business. It represents a major principle of federalism which was arrived at, not casually, but only after great deliberation. Indeed, the clause was considered essential to bind a loose confederacy into a strong union, the very purpose for which the Convention was called. *Id. passim*. The Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). See also *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944); *The Minnesota Rate Cases*, 230 U.S. 352, 398 (1913).

It is not surprising, therefore, that the most-frequently quoted enunciation of the meaning of the Commerce Clause is that of the great Federalist Chief Justice, Marshall:

"The subject to be regulated is commerce; and our constitution being . . . one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. . . . Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches . . . It has been truly said that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term. . . . The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within

a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Gibbons v. Ogden*, 9 Wheat. 1, 189-190, 194, 195 (1824).

These principles have so often been reaffirmed as to be, at this point in time, axiomatic.* *E.g.*, *Wickard v. Filburn*, 317 U.S. 111, 120-125 (1942); *Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342, 350-351 (1914); *Lottery Case*, 188 U.S. 321, 346-347 (1903). They bear repetition because of the guides to interpretation which follow from them. As a great principle of the division of power between the states and the national government, as well as a constitutional provision, the exposition of the meaning of the Commerce Clause must be broad enough to admit of adaptation to future demands. Myopia has little place in judicial interpretation of any sort, let alone constitutional interpretation. The challenges to the federal government change from generation to generation; the application of these various purposes to a given piece of legislation naturally must be viewed accordingly. The Commerce Clause, like other clauses in the Constitution, must be "interpreted with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it." *Carter v. Carter Coal Co.*, 298 U.S. 238,

*It is no longer necessary to discuss the cases earlier in the century which sought to engraft onto the Constitution theories of "proximate cause" which have long since been discredited, even in the law of torts from which they were borrowed. *E.g.*, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Hammer v. Dagenhart*, 247 U.S. 251 (1918), overruled by *United States v. Darby*, 312 U.S. 100 (1941). This line of cases was aberrant and is now simply a historical curiosity.

to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

The purported bases of jurisdiction are Article I, § 8, cl. 3 (the Commerce Clause), and section 5 of the Fourteenth Amendment to the Constitution. The former provision reads:

“The Congress shall have Power . . . to regulate Commerce . . . among the several States . . .”

The latter provision reads:

“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

The relevant provision appears in section 1:

“ . . . nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.”

Section 201 will be tested against the provision of the following Fifth Amendment:

“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”

III. The Issues and Summary of Argument.

Congress clearly sought to legislate only pursuant to the authority granted in part by the Commerce Clause and

in part by the Fourteenth Amendment. No such limiting principle appeared in the Civil Rights Act of March 1, 1875, which read, in relevant part:

“That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law; and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.” 18 Stat. 335.

This statute was held invalid in the *Civil Rights Cases*, 109 U.S. 3 (1883). The policy it sought to enunciate reached far beyond the power of Congress under the Thirteenth through Fifteenth Amendments. The principal holding of the case—that the Fourteenth Amendment prohibits only “state action”—has been reaffirmed by this Court on each occasion on which it has been called into question, and as recently as in the last Term. *Peterson v. Greenville*, 373 U.S. 244 (1963). *Lombard v. Louisiana*, 373 U.S. 267 (1963). The *Civil Rights Cases* did not consider the statute before it under the Commerce Clause, “as the sections in question are not conceived in any such view.” 109 U.S. at 19.

The question before the Court is whether the effort of Congress to contain its legislation within the prescribed bounds was successful. It is, in this respect, noteworthy that Congress did not merely incorporate the constitutional limitations by reference. Subsections (b)(1) and (c)(1) provide in effect that any place for the lodging of transient guests (with the exceptions

set forth) *ipso facto* falls within the jurisdiction of the Commerce Clause. Similarly in subsection (d) Congress defines "state action" which will permit its exercise of jurisdiction.

The Commerce Clause is a major bulwark of our federal system. It authorizes central policy-making in matters which are not local in nature. That the effects of racial discrimination can be burdensome to the national interest has long been recognized. State laws which impose a burden on commerce are themselves in conflict with the power of Congress and are invalid. In addition, Congress has affirmatively regulated private carriers to insure uniform racial policies in interstate travel since 1887. Congress's conclusions must be sustained if any set of facts can rationally be presumed which will support them. Congress might well have found that the burdens on interstate commerce by discrimination do not cease when the carrier's passenger leaves the terminal; or because the citizen decides to travel by automobile. It might also have found that discrimination enervates the whole community and leads to economic stagnation or isolation.

All of the activities described in subsection (d) of the Act have been held to constitute "state action." In effect, this subsection merely incorporates the Equal Protection Clause, with its judicial gloss, into the statute.

The Act does curtail a prior existing "liberty" to discriminate in the conduct of business. All law does likewise. The particular liberty, however, is irrational and runs counter to national policy. An act does not offend the Fifth Amendment when it is designed to serve a legitimate end and chooses means to do so which are not arbitrary or capricious.

IV. Argument.

1. NOT SIMPLY TRADE, BUT ALL INTERCOURSE WHICH AFFECTS THE STATES GENERALLY IS SUBJECT TO THE SCRUTINY OF CONGRESS UNDER THE COMMERCE CLAUSE.

A simplistic reading of the word "commerce" would limit its meaning to traffic, trade, the flow of commodities and similar business enterprises. Yet such a reading would reflect neither the intention of the draftsmen of the clause nor its century and a half of development by judicial interpretation.

The original resolution at the Constitutional Convention, from which the Commerce Clause emerged, granted the Congress power to legislate in all cases where "The harmony of the United States may be interrupted by the exercise of individual legislation." Madison's Debates (as reported in H.R. Doc. No. 398, 69th Cong., 1st Sess., 1929), 117. This Resolution was unanimously approved. *Id.* at 129-130. A counter-proposal, intended to limit Congressional power to matters more closely related to business, was defeated. *Id.* at 234. The final resolution, containing the language of the original resolution, was sent to the Committee on Detail (*id.* at 390, 465), whence it was reported out substantially in the form of Article I, § 8, cl. 3, of the Constitution, and thereupon passed without debate. *Id.* at 495.

To hold that the clause changed its meaning in the Committee on Detail to one which the Convention itself had previously rejected, and, further, that the Convention then, without debate, approved the change, would attribute to the members of the Committee disingenuousness and guile, and to the Convention members a blind acquiescence which affronts credulity. The only plausible explanation of the drafting changes is that the Committee sought to

reduce to language appropriate for a legal document the philosophy approved by the Convention.

So viewed, the Commerce Clause represents not merely a grant of technical, regulatory powers over interstate business. It represents a major principle of federalism which was arrived at, not casually, but only after great deliberation. Indeed, the clause was considered essential to bind a loose confederacy into a strong union, the very purpose for which the Convention was called. *Id. passim*. The Constitution "was framed upon the theory that the peoples of the several states must sink or swim together; and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). See also *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944); *The Minnesota Rate Cases*, 230 U.S. 352, 398 (1913).

It is not surprising, therefore, that the most-frequently quoted enunciation of the meaning of the Commerce Clause is that of the great Federalist Chief Justice, Marshall:

"The subject to be regulated is commerce; and our constitution being . . . one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. . . . Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches . . . It has been truly said that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term. . . . The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within

a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Gibbons v. Ogden*, 9 Wheat. 1, 189-190, 194, 195 (1824).

These principles have so often been reaffirmed as to be, at this point in time, axiomatic.* *E.g.*, *Wickard v. Filburn*, 317 U.S. 111, 120-125 (1942); *Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342, 350-351 (1914); *Lottery Case*, 188 U.S. 321, 346-347 (1903). They bear repetition because of the guides to interpretation which follow from them. As a great principle of the division of power between the states and the national government, as well as a constitutional provision, the exposition of the meaning of the Commerce Clause must be broad enough to admit of adaptation to future demands. Myopia has little place in judicial interpretation of any sort, let alone constitutional interpretation. The challenges to the federal government change from generation to generation; the application of these various purposes to a given piece of legislation naturally must be viewed accordingly. The Commerce Clause, like other clauses in the Constitution, must be "interpreted with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it." *Carter v. Carter Coal Co.*, 298 U.S. 238,

*It is no longer necessary to discuss the cases earlier in the century which sought to engraft onto the Constitution theories of "proximate cause" which have long since been discredited, even in the law of torts from which they were borrowed. *E.g.*, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Hammer v. Dagenhart*, 247 U.S. 251 (1918), overruled by *United States v. Darby*, 312 U.S. 100 (1941). This line of cases was aberrant and is now simply a historical curiosity.

328 (1936) (separate opinion of Cardozo, J.). See also, e.g., *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 551-552 (1944); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42-43 (1937); *The Minnesota Rate Cases*, 230 U.S. 352, 398 (1913); *Hoke v. United States*, 227 U.S. 308, 323 (1913); *Swift and Co. v. United States*, 196 U.S. 375, 398-399 (1905); *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 9, 12 (1877). Of this canon of interpretation, too, Marshall was the admonitor:

“If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.” *Gibbons v. Ogden*, 9 Wheat. 1, 188-189 (1824).

So viewed, the Commerce Clause grants to the federal government, at the very least, power to control and regulate the national economy in all its facets, with all its nuances, and with all its multiple implications. It is therefore not surprising that the clause has authorized Congressional regulation of activities which, at first glance, appear only distantly related to what is generally envisioned by the word “commerce.” These include the prohibition of transportation of liquor across state lines, although in a personal vehicle and for personal consumption, *United States v. Simpson*, 252 U.S. 465 (1920); the carrying of a female across state lines for immoral purposes, either for gain,

Hoke v. United States, 227 U.S. 308 (1913), or for personal concubinage, *Caminetti v. United States*, 242 U.S. 470 (1917); the carrying of a kidnapped person over state lines, even when to avoid arrest and not for ransom, *Gooch v. United States*, 297 U.S. 124 (1936); and the transportation across state lines of stolen automobiles. *Brooks v. United States*, 267 U.S. 432 (1925). "Not only . . . may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic. . . ." *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 549-550 (1944).

2. RACIAL DISCRIMINATION, WHEN IN INTERSTATE COMMERCE NO LESS THAN OTHER ASPECTS OF THE PUBLIC WELL-BEING, FALLS WITHIN THE PURVIEW OF THE COMMERCE CLAUSE.

It has long been recognized that racial discrimination of persons traveling from state to state disrupts the orderly flow of commerce. Uniform treatment of human beings is essential in a mobile society. State laws disruptive of this unity can not stand.

In *Hall v. DeCuir*, 95 U.S. 485 (1877), the Court held that a state statute prohibiting discrimination by carriers could not constitutionally compel an interstate carrier to give equal rights and privileges to members of all races. In *Morgan v. Virginia*, 328 U.S. 373 (1946), the Court held that a state statute requiring segregated facilities could not constitutionally apply to an interstate carrier.

In both cases it was held that the diverse racial regulations of separate states would unduly burden the free flow of interstate commerce, and hence were invalid without the necessity of implementation by Congressional Act:

"The river Mississippi passes through or along the borders of ten different States; and its tributaries reach

many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be." *Hall v. DeCuir, supra*, 95 U.S. at 489-490; quoted with approval, *Morgan v. Virginia, supra*, 328 U.S. at 384, n. 29.

Similarly, in *Edwards v. California*, 314 U.S. 160 (1941), the Court made it quite clear that it would tolerate no state legislation which unreasonably encumbered the means of ingress into the various states. These cases all in-

volve state legislation which directly affronts the jurisdiction of Congress to regulate commerce; and accordingly the Constitution is self-executing. Where a burden of exactly the same nature, but imposed by private companies, and so involving no jurisdictional conflict, was present or potential, Congress has on several occasions exercised its power to achieve unity. Since the passage of the Interstate Commerce Act in 1887, interstate rail carriers have been prohibited from subjecting "any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . ." 24 Stat. 380, 49 U.S.C. § 3(1). The Interstate Commerce Commission early interpreted this section as prohibiting racial discrimination. *Council v. Western & Atlantic Railroad*, 1 I.C.C. 339. In *Mitchell v. United States*, 313 U.S. 80 (1941), the Court affirmed that section 3(1) requires that equal facilities be given to all passengers, regardless of race. In *Henderson v. United States*, 339 U.S. 816 (1950), the Court made it clear that "equal facilities" means the full, unfettered use of all facilities on an unsegregated and nondiscriminatory basis.

Air carriers subject to the Civil Aeronautics Act are subject to the same strictures, 49 U.S.C. § 484(b), *Fitzgerald v. Pan American World Airways, Inc.*, 229 F. 2d 499 (2d Cir. 1956), as are interstate motor carriers and all terminal facilities, whether or not owned or operated by the carrier, which service the passengers with the co-operation or acquiescence of the carrier. 49 U.S.C. § 316(d). *Boynton v. Virginia*, 364 U.S. 454 (1960). See *United States v. Jackson*, 318 F. 2d 1 (5th Cir. 1963). All of the statutes referred to were passed under the authority granted Congress by the Commerce Clause. No question of the validity of the exercise to prohibit racial discrimination was even raised in these cases.

3. THE CONGRESSIONAL DETERMINATION THAT THE TYPES OF BUSINESS DESCRIBED IN SECTION 201(b)(1) AFFECT COMMERCE IS FULLY JUSTIFIED.

Those cases which have survived have made it clear that the limits of Congressional power under the Commerce Clause are susceptible neither to simple definition nor to precise statement. The power of Congress is not to be defeated solely because the activity sought to be regulated, when considered without reference to the total context in which it arises, occurs prior or subsequent to actual interstate fraud or otherwise is local in character. The determinative test is the practical test enunciated by Marshall: whether the activity sought to be regulated has a real and substantial relation to the national interest, in view of the purposes of the Commerce Clause to permit the Congress to provide for uniformity in all matters affecting the economic well-being of the nation. *E.g.*, *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946); *North American Co. v. Securities & Exchange Commission*, 327 U.S. 686 (1946); *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *Currin v. Wallace*, 306 U.S. 1 (1939); *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U.S. 453 (1938); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937); *Second Employers' Liability Cases*, 223 U.S. 1 (1912); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

Mr. Justice Cardozo stated the principle this way:

"Sometimes it is said that the relation [of the activity to commerce] must be 'direct' to bring that

power [of Congress] into play. In many circumstances such a description will be sufficiently precise to meet the needs of the occasion. But a great principle of constitutional law is not susceptible of comprehensive statement in an adjective. The underlying thought is merely this, that 'the law is not indifferent to considerations of degree.' *Schechter Poultry Corp. v. United States*, *supra* [295 U.S. 495], concurring opinion, p. 554. It cannot be indifferent to them without an expansion of the commerce clause that would absorb or imperil the reserved powers of the states. At times, as in the case cited, the waves of causation will have radiated so far that their undulatory motion, if discernible at all, will be too faint or obscure, too broken by cross-currents, to be heeded by the law. In such circumstances the holding is not directed at prices or wages considered in the abstract, but at prices or wages in particular conditions. The relation may be tenuous or the opposite according to the facts. Always the setting of the facts is to be viewed if one would know the closeness of the tie." *Carter v. Carter Coal Co.*, 298 U.S. 238, 327-328 (separate opinion).

It is true that Congress cannot by its own will usurp the Court's function to develop the constitutional principles which measure the extent of the jurisdictional competence of that Legislature. On the other hand, Congress, and only Congress, has the capacity and the power to find legislative facts, such as the nature and quality of any effect on commerce which any given activity may have. The Court must accept these findings if they are not capricious.

"Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden

the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent." *Board of Trade of Chicago v. Olsen*, 262 U.S. 1; 37 (1923); quoting with approval *Stafford v. Wallace*, 258 U.S. 495, 521 (1922).

If, as here, express legislative findings have not been made, then the Court must assume any rational set of facts which the Legislature could have found.

"Even in the absence of [legislative findings and committee reports] . . . the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). See also *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-488 (1955); *Day-Brite Lighting, Inc., v. Missouri*, 342 U.S. 421, 423 (1952).

The list of possible legislative findings to support section 201 need not be catalogued. It is obvious that many persons of the discriminated-against minority will avoid traveling in areas where they expect to be humiliated and

degraded; that many of the majority will avoid traveling in areas where unfairness to others is an accepted way of life. Congress could rationally find that discrimination poisons the heart of the actor and destroys the initiative of the victim; that indolence, poverty and discontent are the natural byproducts of unfair treatment; and that an atmosphere in which discrimination is prevalent breeds despair and ultimately violence. Surely Congress could find that the climate for economic development in such areas is adversely affected by the discrimination. Congress might well have found that the public accommodations described in the Act constitute an indispensable aspect of travel within the United States. It makes no difference that the accommodations were not described as doing any specified portion of interstate business. Congress might have found that this type of accommodations ordinarily in the future would appeal to travelers. Furthermore, it might have found that discrimination by even a local business of this type would so infect the desirability of the area to out-of-state persons as to burden commerce. Cf. *Wickard v. Filburn*, 317 U.S. 111 (1942). Congress might have found that uniform racial treatment of patrons, both in local and in interstate trade, would free the channels of interstate commerce and unfetter the bonds on these channels which currently exist. *Gooch v. United States*, 297 U.S. 124 (1936). *Caminetti v. United States*, 242 U.S. 470 (1917).

In *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714, 720-721 (1963), the Court emphasized that both the *Hall* and *Morgan* cases, *supra*, were based on the principle which demands a single racial policy in matters affecting commerce. Since *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1954) and its progeny, the disparate state legislation which existed when both *Hall* and *Morgan* were decided has disappeared.

Yet Congress could certainly find that the inconvenience and burden on interstate commerce of racial discrimination are not less acute when imposed by private persons than when imposed by governmental decree. It may be true that discrimination by common carriers, because they carry many people along fixed routes, would be more dramatic than is the discrimination against the simple motorist. Congress could well find, however, that discrimination to which section 201 relates is neither isolated nor sporadic, and that its cumulative impact on the economy today is fully as severe as would be discrimination on carriers. It makes no difference that the proprietor of a hotel may not himself have the power to affect commerce that resides in a great carrier. His enterprise is a part of a nationwide industry which cumulatively has such an effect. *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944). *Wickard v. Filburn*, 317 U.S. 111 (1942). Nor is the fact that actual interstate traffic need not necessarily be involved critical. An activity does not become "interstate" commerce merely because of movement. Such a criterion would reduce the clause to a technicality. It becomes so because it affects "intercourse" among the states, with all the richness of meaning which history implies to that word, e.g., *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948).

Slack v. Atlantic White Tower Systems, Inc., 284 F. 2d 746 (4th Cir. 1960), and *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir. 1959), are not to the contrary.

In the *Williams* case plaintiff alleged discrimination by defendant's restaurant on a major highway north from Washington, D.C. The plaintiff was traveling from New York to Washington at the time of the incident. The Court held at page 848:

"... we do not find that a restaurant is engaged in interstate commerce merely because in the course of its business of furnishing accommodations to the general public it serves persons who are traveling from state to state. As an instrument of local commerce, the restaurant is not subject to the constitutional and statutory provisions discussed above [Art. I, § 8; cl. 3, U.S. Const.; 49 U.S.C. § 3(1)] and, thus, is at liberty to deal with such persons as it may select."

This language might be read to hold that Congress would be without power to legislate in the area, since the restaurant was not "engaged in interstate commerce." On the other hand, all that was necessary for the decision was the holding that section 3(1) does not cover facilities beyond the terminal, since the Act is designed only to regulate the carriers' activity; and that the Commerce Clause is not self-executing against private businesses.

It would be, perhaps, possible to conjure up a hypothetical situation where all would agree that there was no effect on commerce, notwithstanding that the establishment met the literal criteria of the statute. But there is scarcely a statute in existence to which this statement could not apply. This Court has often held that a statute may not constitutionally be applied in a given case, and yet that the statute is constitutional because it expresses a constitutional policy. *Cf.* opinion of Brandeis, J., in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 293 (1921). It is not the function of this Court to imagine bizarre circumstances, isolated from the problem sought to be alleviated by the statute, merely to invalidate the statute. Were this not true, little legislation could pass muster.

It is therefore clear that, once the subject matter being regulated is confined to that which affects commerce, the

scope of congressional power is as broad as is the vast residuum of power in the states to legislate for the public welfare known as the "police power." See, e.g., *United States v. Darby*, 312 U.S. 100, 104 (1941); *United States v. Carolene Products Co.*, 304 U.S. 144, 147 (1938); *Lottery Case*, 188 U.S. 321, 347 (1903); *Gibbons v. Ogden*, 9 Wheat. 1, 194 (1824). And when this Court had occasion to consider the validity of state legislation comparable to that in the case at bar, its answer was succinct and unambiguous:

"... certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states. See *Railway Mail Assn. v. Corsi*, 326 U. S. 88, 93-94; *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 34." *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100, 109 (1953).

There is no reason why Congress should not have similar powers with respect to businesses subject to its control.

4. THE CONSTITUTIONALITY OF THE STATE ACTION PORTION OF SUBSECTION (b) OF SECTION 201, AS DEFINED IN SUBSECTION (d), IS CLEAR.

That any discrimination, under color of law, or usage enforced by official action is "state action" prohibited by the Equal Protection Clause of the Fourteenth Amendment was definitively decided last term. *Lombard v. Louisiana*, 373 U.S. 267 (1963). Comparable requirements of law have been held unconstitutional since *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1954). See, e.g., *Bailey v. Patterson*, 369 U.S. 31 (1962). Congress in this section has merely implemented the constitutional limitation on

state power by new enforcement provisions (§§ 204-207), while leaving the development of the appropriate substantive principle to the courts. Cf. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

5. SECTION 201(b)(1) OF THE CIVIL RIGHTS ACT OF 1964 DOES NOT OFFEND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

There remains to be discussed only the question of the curtailment of the liberty of contract and rights to the use of property which the Act imposes on operators of public accommodations. In this respect also the constitutionality of the statute is supported both by precedent and by principle.

We submit that *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100 (1953), is controlling. There the Court upheld a "public accommodations" statute similar in effect to that in the case at bar. We shall accordingly discuss the controlling principles only briefly.

It is, of course, indisputable that the Civil Rights Act of 1964 does restrict unfettered liberty of contract and right to develop property. This fact, however, does not distinguish it from the myriad economic and other regulations at all levels of government which also regulate and curtail theretofore existing personal liberties and rights. These regulations prevent chaos and permit order and progress in an increasingly complex society. The Fifth Amendment is not merely a sanction for anarchy. Its design and effect are to prevent tyranny by precluding arbitrary governmental action. The real constitutional issue here, as in most cases of "substantive due process," is whether the law seeks to effectuate some genuine public benefit and whether the means chosen acts whimsically and arbitrarily against the regulated party. That this is the

only fruitful way to analyze the constitutional issue has often been reiterated by this Court.

“These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

“The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.” *Nebbia v. New York*, 291 U.S. 502, 510, 524-525 (1934). See also *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

Thus it is clear that the constitutional language is not technical or talismanic. Its meaning cannot be derived by arithmetic, semantics or sophistry. The question in each case involves a sensitive constitutional judgment of evalu-

ating the purposes of the legislation involved, and its effect on the populace.

We have already shown that the elimination of discrimination in interstate activities is a proper object of the federal government. In this section, we shall assume that the subject matter of the legislation was cognizable under the Commerce Clause, since if this assumption is wrong, this section is academic. It is also not inappropriate to point out that the national policy against discrimination is so powerful as to preclude the maintenance of any segregated public facilities. *E.g.*, *New Orleans City Park Improvement Association v. Detiege*, 252 F. 2d 122 (5th Cir., 1958), *aff'd per curiam*, 358 U.S. 54 (1958) (housing); *Holmes v. Atlanta*, 223 F. 2d 93 (5th Cir.), *aff'd per curiam*, 350 U.S. 879 (1955) (public parks and golf courses); *Dawson v. Mayor and City Council of Baltimore City*, 220 F. 2d 386 (4th Cir.), *aff'd per curiam*, 350 U.S. 877 (1955) (public beaches). Furthermore, no Court or other such governmental authority may even lend its assistance to the enforcement of purely private discriminatory agreements. *Barrows v. Jackson*, 346 U.S. 249 (1953). *Shelley v. Kraemer*, 334 U.S. 1 (1948).

It could not reasonably be contended that the same due process limitation on the scope of local governmental activity would also prohibit the federal government from enacting legislation designed to effectuate the principles of due process. Such an assertion of constitutional schizophrenia has been dealt with sharply by this Court in considering a state fair employment practices law. In *Railway Mail Association v. Corsi*, 326 U.S. 88 (1944), the appellant association contended that that portion of the New York Civil Rights Law which prohibited discrimination in a labor organization was void under the Fourteenth Amendment. Mr. Justice Reed, in delivering the judgment of a unanimous Court, held:

"A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees." *Id.* at 93-94.

Mr. Justice Frankfurter, in a separate concurrence devoted solely to this point, expressed his view as follows:

"Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. Of course a State may leave abstention from such discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of non-discrimination beyond that which the Constitution itself exacts." *Id.* at 98.

In *Levitt & Sons, Inc., v. Division Against Discrimination*, 31 N.J. 514, 158 A. 2d 177 (1960), the Supreme Court

of New Jersey upheld legislation prohibiting discrimination in publicly assisted housing. The relationship of landlord to tenant, of course, is much closer, longer lasting and financially significant than is the casual relationship of transient guest to hotel owner. The curtailment of the landlord's "liberty" and "freedom of property" in the New Jersey case was accordingly much more substantial than is that entailed by section 201. Nonetheless, when the decision was appealed on constitutional grounds, this Court dismissed it for want of a substantial federal question. *Levitt & Sons, Inc., v. Division Against Discrimination*, 363 U.S. 418 (1960). See also, e.g., *Holland v. Edwards*, 307 N.Y. 38, 119 N.E. 2d 581 (1954), upholding New York's Fair Employment Practices Law; *Massachusetts Commission Against Discrimination v. Colangelo*, 344 Mass. 387, 182 N.E. 2d 595 (1962), upholding Massachusetts' Fair Housing Practices Law.

It is noteworthy that over half the states have "public accommodations" laws. See *Morgan v. Virginia*, 328 U.S. 373, 382, n. 24 (1946); Alaska Comp. Laws Ann. §§ 20-1-34; Idaho Code Ann. §§ 18-1701-03; Maine Rev. Stat. Ann. c. 137, § 50; Mont. Rev. Code Ann. § 64-211; N.H. Rev. Stat. Ann. c. 354; N.M. Stat. Ann. 49-8-1-6; N. Dak. Cent. Code § 12-22-30; Ore. Rev. Stat. §§ 30, 670-680; Vt. Stat. Ann. tit. 13 §§ 1451-52; Wyoming Laws, 1961, c. 103. Such laws have existed since 1865. See Mass. Stat. 1865, c. 277. Their passage was suggested to be an appropriate exercise of state legislative power in the *Civil Rights Cases*, 109 U.S. 3, 24 (1883). The constitutionality of such statutes against due process objections never has been seriously questioned. See, e.g., *Crawford v. Robert L. Kent, Inc.*, 341 Mass. 125, 167 N.E. 2d 620 (1960); *Opinion of the Justices*, 247 Mass. 589, 595, 143 N.E. 808 (1924). The goals sought to be achieved by the legislation are harmony, confrontation of many persons of diverse backgrounds, freedom of move-

ment and better intercourse among the citizens of the various states. It is no answer to allege that Congress is "seeking to legislate morals." Congress is not so doing. It is seeking to control overt, anti-social behavior which adversely affects citizens and the nation. In so doing, it is performing its constitutional mandate. If the requirement that landlords shall rent without discrimination does not present even a substantial federal question, surely the requirement that hotel owners admit overnight guests on the same basis is no more substantial.

Conclusion.

For the foregoing reasons the questioned statute should be held to be constitutional.

Respectfully submitted,

EDWARD W. BROOKE,

Attorney General of Massachusetts.

SUPREME COURT OF THE UNITED STATES

No. 515.—OCTOBER TERM, 1964.

| | |
|-------------------------------|--|
| Heart of Atlanta Motel, Inc., | } On Appeal From the |
| Appellant, | |
| v. | |
| United States et al. | } United States District Court for the Northern District of Georgia. |

[December 14, 1964.]

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a declaratory judgment action, 28 U. S. C. § 2201 and § 2202, attacking the constitutionality of Title II of the Civil Rights Act of 1964, 78 Stat 241.¹ In addition to declaratory relief the complaint sought an injunction restraining the enforcement of the Act and damages against respondents based on allegedly resulting injury in the event compliance was required. Appellees counterclaimed for enforcement under § 206 (a) of the Act and asked for a three-judge district court under § 206 (b). A three-judge court, empaneled under § 206 (b) as well as 28 U. S. C. § 2282, sustained the validity of the Act and issued a permanent injunction on appellee's counterclaim restraining appellants from continuing to violate the Act which remains in effect on order of MR. JUSTICE BLACK, 85 Sup. Ct. 1. We affirm the judgment.

1. *The Factual Background and Contentions of the Parties.*

The case comes here on admissions and stipulated facts. Appellant owns and operates the Heart of Atlanta Motel which has 216 rooms available to transient guests. The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the

¹ See Appendix.

2 ATLANTA MOTEL v. UNITED STATES.

State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State. Prior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.

The appellant contends that Congress in passing this Act exceeded its power to regulate commerce under Art. I, § 8, cl. 3, of the Constitution of the United States; that the Act violates the Fifth Amendment because appellant is deprived of the right to choose its customers and operate its business as it wishes, resulting in a taking of its liberty and property without due process of law and a taking of its property without just compensation; and, finally, that by requiring appellant to rent available rooms to Negroes against its will, Congress is subjecting it to involuntary servitude in contravention of the Thirteenth Amendment.

The appellees counter that the unavailability to Negroes of adequate accommodations interferes significantly with interstate travel, and that Congress, under the Commerce Clause, has power to remove such obstructions and restraints; that the Fifth Amendment does not forbid reasonable regulation and that consequential damage does not constitute a "taking" within the meaning of that amendment; that the Thirteenth Amendment claim fails because it is entirely frivolous to say that an amendment directed to the abolition of human bondage and the removal of widespread disabilities associated with slavery places discrimination in public accommodations beyond the reach of both federal and state law.

At the trial the appellant offered no evidence, submitting the case on the pleadings, admissions and stipulation of facts; however, appellees proved the refusal of the motel to accept Negro transients after the passage of the Act. The District Court sustained the constitutionality of the sections of the Act under attack (§§ 201 (a), (b) (1) and (c) (1)) and issued a permanent injunction on the counterclaim of the appellees. It restrained the appellant from "refusing to accept Negroes as guests in the motel by reason of their race or color" and from "making any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities, privileges, advantages or accommodations offered or made available to guests of the motel, or to the general public, within or upon any of the premises of the Heart of Atlanta Motel, Inc."

2. *The History of the Act.*

Congress first evidenced its interest in civil rights legislation in the Civil Rights or Enforcement Act of April 9, 1866.² There followed a series of six Acts,³ culminating in the Civil Rights Act of March 1, 1875.⁴ In 1883 this Court struck down the public accommodations sections of the 1875 Act in *The Civil Rights Cases*, 109 U. S. 3. No major legislation in this field had been enacted by Congress for 82 years when the Civil Rights Act of 1957⁵ became law. It was followed by the Civil Rights Act of 1960.⁶ Three years later, on June 19, 1963, the late President Kennedy called for civil rights legislation in a

² 14 Stat. 27.

³ Slave Kidnapping Act, 14 Stat. 50; Peonage Abolition Act of March 2, 1867, 14 Stat. 546; Act of May 31, 1870; 16 Stat. 140; Anti-Lynching Act of April 20, 1871, 17 Stat. 13.

⁴ Civil Rights Act of March 1, 1875, 18 Stat. 335.

⁵ 71 Stat. 634.

⁶ 74 Stat. 86.

4 ATLANTA MOTEL v. UNITED STATES.

message to Congress to which he attached a proposed bill. Its stated purpose was

to promote the general welfare, by eliminating discrimination based on race, color, religion, or national origin in . . . public accommodations through the exercise by Congress of the powers conferred upon it . . . to enforce the provisions of the Fourteenth and Fifteenth Amendments, to regulate commerce among the several states, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution.

Bills were introduced in each House of the Congress, embodying the President's suggestion, the one in the Senate being S. 1732¹ and that in the House, H. R. 7152. However, it was not until July 2, 1964 that the Civil Rights Bill of 1964, here under attack, was finally passed.

After extended hearings each of these bills was favorably reported to its respective house, H. R. 7152 on November 20, 1963, H. R. Rep. No. 914, 88th Cong., 1st Sess., and S. 1732 on February 10, 1964, S. Rep. No. 872, 88th Cong., 2d Sess. Although each bill originally incorporated extensive findings of fact these were eliminated from the bills as they were reported. The House passed its bill in January 1964, and sent it to the Senate. Through a bipartisan coalition of Senators Humphrey and Dirksen, together with other Senators, a substitute was worked out in informal conferences. This substitute was adopted by the Senate and sent to the House where it was adopted without change. This expedited procedure prevented the usual report on the substitute bill in the Senate as well as a Conference Committee report

¹ A second Senate bill, S. 1731, was based solely on the Fourteenth Amendment. The Senate Judiciary Committee conducted the hearings on S. 1731, while the Committee on Commerce considered S. 1732.

ordinarily filed in such matters. Our only frame of reference as to the legislative history of the Act is, therefore, the hearings, reports and debates on the respective bills in each house.

The Act as finally adopted was most comprehensive, undertaking to prevent through peaceful and voluntary settlement discrimination in voting, as well as in places of accommodation and public facilities, federally secured programs and in employment. Since Title II is the only portion under attack here, we confine our consideration to those public accommodation provisions.

3. *Title II of the Act.*

This Title is divided into seven sections beginning with § 201 (a) which provides that:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

There are listed in § 201 (b) four classes of business establishments, each of which "serves the public" and "is a place of public accommodation" within the meaning of § 201 (a) "if its operations affect commerce, or if discrimination or segregation by it is supported by State action."

The covered establishments are:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria . . . [not here involved];

6 ATLANTA MOTEL v. UNITED STATES.

(3) any motion picture house . . . [not here involved];

(4) any establishment . . . which is physically located within the premises of any establishment otherwise covered by this subsection, or . . . within the premises of which is physically located any such covered establishment . . . [not here involved].

Section 201 (c) defines the phrase "affect commerce" as applied to the above establishments. It first declares that "any inn, hotel, motel, or other establishment which provides lodging to transient guests" affects commerce *per se*. Restaurants, cafeterias, etc., in the second class affect commerce only if they serve or offer to serve interstate travelers or if a substantial portion of the food which they serve or products which they sell have "moved in commerce." Motion picture houses and other places listed in class three affect commerce if they customarily present films, performances, etc., "which move in commerce." And the establishments listed in class four affect commerce if they are within, or include within their own premises, an establishment "the operations of which affect commerce." Private clubs are excepted under certain conditions. See § 201 (e).

Section 201 (d) declares that "discrimination or segregation" is supported by state action when carried on under color of any law, statute, ordinance, regulation or any custom or usage required or enforced by officials of the State or any of its subdivisions.

In addition, § 202 affirmatively declares that all persons "shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof."

Finally § 203 prohibits the withholding or denial, etc., of any right or privilege secured by § 201 and § 202 or the intimidation, threatening or coercion of any person with the purpose of interfering with any such right or the punishing, etc., of any person for exercising or attempting to exercise any such right.

The remaining sections of the Title are remedial ones for violations of any of the previous sections. Remedies are limited to civil actions for preventive relief. The Attorney General may bring suit where he has "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described" § 206 (a). Thirty days written notice before filing any such action must be given to the appropriate authorities of a State or subdivision the law of which prohibits the act complained of and which has established an authority which may grant relief therefrom. § 204 (c). In States where such condition does not exist the court after a case is filed may refer it to the Community Relations Service which is established under Title X of the Act. § 204 (d). This Title establishes such service in the Department of Commerce, provides for a Director to be appointed by the President with the advice and consent of the Senate and grants it certain powers, including the power to hold hearings, with reference to matters coming to its attention by reference from the court or between communities and persons involved in disputes arising under the Act.

4. Application of Title II to Heart of Atlanta Motel.

It is admitted that the operation of the motel brings it within the provisions of § 201 (a) of the Act and that

8 ATLANTA MOTEL v. UNITED STATES.

appellant refused to provide lodging for transient Negroes because of their race or color and that it intends to continue that policy unless restrained.

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on § 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, § 8, cl. 3 of the Constitution.

The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." At the same time, however, it noted that such an objective has been and could be readily achieved "by congressional action based on the commerce power of the Constitution." S. Rep. No. 872, at 16-17. Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone. Nor is § 201 (d) or § 202, having to do with state action, involved here and we do not pass upon those sections.

5. *The Civil Rights Cases, 109 U. S. 3 (1883), and their Application.*

In light of our ground for decision, it might be well at the outset to discuss the *Civil Rights Cases, supra*, which declared provisions of the Civil Rights Act of 1875 unconstitutional. 18 Stat. 335, 336. We think that

decision inapposite, and without precedential value in determining the constitutionality of the present Act. Unlike Title II of the present legislation, the 1875 Act broadly proscribed discrimination in "inns, public conveyances on land or water, theaters, and other public places of amusement," without limiting the categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved. Further, the fact that certain kinds of businesses may not in 1875 have been sufficiently involved in interstate commerce to warrant bringing them within the ambit of the commerce power is not necessarily dispositive of the same question today. Our populace had not reached its present mobility, nor were facilities, goods and services circulating as readily in interstate commerce as they are today. Although the principles which we apply today are those first formulated by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1 (1824), the conditions of transportation and commerce have changed dramatically, and we must apply those principles to the present state of commerce. The sheer increase in volume of interstate traffic alone would give discriminatory practices which inhibit travel a far larger impact upon the nation's commerce than such practices had in the economy of another day. Finally, there is language in the *Civil Rights Cases* which indicates that the Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power. Though the Court observed that "no one will contend that the power to pass it was contained in the Constitution before adoption of the last three amendments (Thirteenth, Fourteenth, and Fifteenth)," the Court went on specifically to note that the

10 ATLANTA MOTEL v. UNITED STATES.

Act was not "conceived" in terms of the commerce power and expressly pointed out:

Of course, these remarks [as to lack of congressional power] do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States, and with the Indian tribes In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. [At 18.]

Since the commerce power was not relied on by the Government and was without support in the record it is understandable that the Court narrowed its inquiry and excluded the Commerce Clause as a possible source of power. In any event, it is clear that such a limitation renders the opinion devoid of authority for the proposition that the Commerce Clause gives no power to Congress to regulate discriminatory practices now found substantially to affect interstate commerce. We, therefore, conclude that the *Civil Rights Cases* have no relevance to the basis of decision here where the Act not only explicitly relies upon the commerce power, but the record is filled with testimony of obstructions and restraints resulting from the discriminations found to be existing. We now pass to that phase of the case.

6. *The Basis of Congressional Action.*

While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. See Hearings before Senate Committee on Commerce on

S. 1732, 88th Cong., 1st Sess.; S. Rep. No. 872, *supra*; Hearings before Senate Committee on the Judiciary on S. 1731, 88th Cong., 1st Sess.; Hearings before House Subcommittee No. 5 on miscellaneous proposals regarding Civil Rights, 88th Cong., 1st Sess., ser. 4; H. R. Rep. No. 914, *supra*. This testimony included the fact that our people have become increasingly mobile with millions of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight, S. Rep. No. 872, at 14-22; and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself "dramatic testimony of the difficulties" Negroes encounter in travel, Senate Commerce Hearings, at 692-694. These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is "no question that this discrimination in the North still exists to a large degree" and in the West and Midwest as well. Senate Commerce Hearings, at 735, 744. This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. Senate Commerce Hearings, at 744. This was the conclusion not only of the Under Secretary of Commerce but also of the Administrator of the Federal Aviation Agency who wrote the Chairman of the Senate

12 ATLANTA MOTEL v. UNITED STATES.

Commerce Committee that it was his "belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations." Senate Commerce Hearings, at 12-13. We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

7. *The Power of Congress Over Interstate Travel:*

The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause. Its meaning was first enunciated 140 years ago by the great Chief Justice John Marshall in *Gibbons v. Ogden*, 9 Wheat. 1 (1824), in these words:

The subject to be regulated is commerce; and . . . to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities . . . but it is something more: it is intercourse . . . between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. [At 189-190.]

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse No sort of trade can be carried on . . . to which this power does not extend. [At 193-194.]

The subject to which the power is next applied, is to commerce "among the several States." The word "among" means intermingled

[I]t may very properly be restricted to that commerce which concerns more States than one. . . . The genius and character of the whole government seems to be, that its action is to be applied to all the . . . internal concerns [of the nation] which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. [At 194-195.]

We are now arrived at the inquiry—What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress . . . is plenary as to those objects [specified in the Constitution], the power over commerce . . . is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many

14 ATLANTA MOTEL v. UNITED STATES.

other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments. [At 196-197.]

In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more than one state" and has a real and substantial relation to the national interest. Let us now turn to this facet of the problem.

That the "intercourse" of which the Chief Justice spoke included the movement of persons through more States than one was settled as early as 1849, in the *Passenger Cases*, 7 How. 283, where Mr. Justice McLean stated: "That the transportation of passengers is a part of commerce is not now an open question." At 401. Again in 1913 Mr. Justice McKenna, speaking for the Court, said: "Commerce among the States, as we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property," *Hoke v. United States*, 227 U. S. 308, 320. And only four years later in 1916 in *Caminetti v. United States*, 242 U. S. 470, Mr. Justice Day held for the Court:

The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress; under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question. [At 491.]

Nor does it make any difference whether the transportation is commercial in character. *Id.*, at 484-486. In

Morgan v. Virginia, 328 U. S. 373 (1946), Mr. Justice Reed observed as to the modern movement of persons among the States:

The recent changes in transportation brought about by the coming of automobiles does not seem of great significance in the problem. People of all races travel today more extensively than in 1878 when this Court first passed upon state regulation of racial segregation in commerce. [It but] emphasizes the soundness of this Court's early conclusion in *Hall v. DeCuir*, 95 U. S. 485. [At 383.]

The same interest in protecting interstate commerce which led Congress to deal with segregation in interstate carriers and the white slave traffic has prompted it to extend the exercise of its power to gambling, *Lottery Case*, 188 U. S. 321 (1903); to criminal enterprises, *Brooks v. United States*, 267 U. S. 432 (1925); to deceptive practices in the sale of products, *Federal Trade Comm'n v. Mandel Bros., Inc.*, 359 U. S. 385 (1959); to fraudulent security transactions, *Securities & Exchange Comm'n v. Ralston Purina Co.*, 346 U. S. 119 (1953); to misbranding of drugs, *Weeks v. United States*, 245 U. S. 618 (1918); to wages and hours, *United States v. Darby*, 312 U. S. 100 (1941); to members of labor unions, *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); to crop control, *Wickard v. Filburn*, 317 U. S. 111 (1942); to discrimination against shippers, *United States v. Baltimore & Ohio R. Co.*, 333 U. S. 169 (1948); to the protection of small business from injurious price cutting, *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115 (1954); to resale price maintenance, *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U. S. 386 (1964); *Schwegmann v. Calvert Distillers Corp.*, 341 U. S. 384 (1951); to professional football, *Radovich v. National Football League*, 352 U. S. 445 (1957); and to racial discrimina-

tion by owners and managers of terminal restaurants. *Boynton v. Virginia*, 364 U. S. 454 (1960).

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, "if it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze." *United States v. Women's Sportswear Mfrs. Assn.*, 336 U. S. 460, 464 (1949). See *Labor Board v. Jones & Laughlin Steel Corp.*, *supra*. As Chief Justice Stone put it in *United States v. Darby*, *supra*:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch v. Maryland*, 4 Wheat. 316, 421. [At 118.]

Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial

and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may—as it has—prohibit racial discrimination by motels serving travelers, however “local” their operations may appear.

Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no “right” to select its guests as it sees fit, free from governmental regulation.

There is nothing novel about such legislation. Thirty-two States* now have it on their books either by statute

* The following States have enacted public accommodation laws: Alaska Stats. §§ 11.60.230–11.60.240 (1962); Calif. Civil Code §§ 51–54 (1954); Colo. Rev. Stats. §§ 25–1–1 to 25–2–5 (1953); Conn. Gen. Stats. Ann. § 53.35 (1961); Del. Code Ann. Tit. 6, c. 45 (1963); Idaho Code §§ 18–7301 through 18–7303 (1961); Ill. Ann. Stats. (Smith-Hurd ed.) c. 38 §§ 13–1 to 13–4 (1961) c. 43 § 133 (1944); Ind. Stats. Ann. (Burns ed.) §§ 10–901 to 10–914 (1961); Iowa Code Ann. §§ 735.1–735.2 (1950); Kan. Gen. Stats. Ann. § 21–2424 (Supp. 1962); Maine Rev. Stats. C. 137 § 50 (1954); Md. Ann. Code § 49 B § 11 (1964); Mass. Ann. Laws C. 140 §§ 5 and 8 (1957), c. 272 §§ 92A, 9B (1963); Mich. Stats. Ann. §§ 28.343 and 28.344 (1962); Minn. Stats. Ann. § 327.09 (1947); Mont. Rev. Codes, Tit. 64, § 211 (1962); Neb. Rev. Stats. C. 20 §§ 101 and 102 (1954); N. H. Rev. Stats. Ann. C. 354 §§ 1, 2, 4 and 5 (1963); N. J. Stats. Ann., Tit. 10, §§ 1–2 to 1–7; Tit. 18, §§ 25–1 to 25.6 (1963); N. M. Stats. Ann. §§ 49–8–1 to 49–8–6 (1963); N. Y. Civil Rights Law (McKinney's ed.) Art. 4, §§ 40, 41 (1946); Exec. Law Art. 15, § 2901 (1964); Penal Law Art. 46, §§ 513–515 (1944); N. Dak. Cent. Code § 12–22–30 (1963); Ohio Rev. Code (Page's ed.) §§ 2901–35 and 2901–36 (1954); Oreg. Rev. Stats. §§ 30–670, 30–675, 30–680; (1963); Penn. Stats. Ann., Tit. 18, § 4654 (1963);

18 ATLANTA MOTEL v. UNITED STATES.

or executive order and many cities provide such regulation. Some of these Acts go back four-score years. It has been repeatedly held by this Court that such laws do not violate the Due Process Clause of the Fourteenth Amendment. Perhaps the first such holding was in the *Civil Rights Cases*, themselves, where Mr. Justice Bradley for the Court inferentially found that innkeepers, "by the laws of all of the States, so far as we are aware, are bound; to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them." At 25.

As we have pointed out, 32 States now have such statutes and no case has been cited to us where the attack on a state statute has been successful, either in federal or state courts. Indeed, in some cases the Due Process and Equal Protection Clause objections have been specifically discarded in this Court. *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 34, n. 12 (1948). As a result the constitutionality of such state statutes stands unquestioned. "The authority of the Federal Government over interstate commerce does not differ," it was held in *United States v. Rock Royal Co-op., Inc.*, 307 U. S. 533. (1939). "in extent or character from that retained by the states over intrastate commerce." At 569-570. See also *Bowles v. Willingham*, 321 U. S. 503 (1944).

It is doubtful if in the long run appellant will suffer economic loss as a result of the Act. Experience is to the

R. I. Gen. Laws §§ 11-24-1 to 11-24-6 (1956); S. Dak. Sess. Laws C. 58 (1963); Vt. Stats. Ann., Tit. 13, §§ 1451, 1452 (1958); Wash. Rev. Code Ann. §§ 49.60.010 to 49.60-170, 9.91.010 (1962); Wis. Stats. Ann. § 942-04 (1958); Wyo. Stats. Ann. § 6-83.1, 6-83.2 (1963).

In 1963 the Governor of Kentucky issued an executive order requiring all governmental agencies involved in the supervision or licensing of businesses to take all lawful action necessary to prevent racial discrimination.

contrary where discrimination is completely obliterated as to all public accommodations. But whether this be true or not is of no consequence since this Court has specifically held that the fact that a "member of the class which is regulated may suffer economic losses not shared by others . . . has never been a barrier" to such legislation. *Bowles v. Willingham*, *supra*, at 518. Likewise in a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty. See *District of Columbia v. John R. Thompson Co.*, 346 U. S. 100 (1953), and cases there cited, where we concluded that Congress had delegated law-making power to the District of Columbia "as broad as the police power of a state" which included the power to adopt "a law prohibiting discriminations against Negroes by the owners and managers of restaurants in the District of Columbia." At 110. Neither do we find any merit in the claim that the Act is a taking of property without just compensation. The cases are to the contrary. See *Legal Tender Cases*, 12 Wall. 457, 551 (1870); *Omnia Commercial Co. v. United States*, 261 U. S. 502 (1923); *United States v. Central Eureka Mining Co.*, 357 U. S. 155 (1958).

We find no merit in the remainder of appellant's contentions, including that of "involuntary servitude." As we have seen, 32 States prohibit racial discrimination in public accommodations. These laws but codify the common-law innkeeper rule which long predated the Thirteenth Amendment. It is difficult to believe that the Amendment was intended to abrogate this principle. Indeed, the opinion of the Court in *The Civil Rights Cases* is to the contrary as we have seen, it having noted with approval the laws of "all of the states" prohibiting discrimination. We could not say that the requirements

20 ATLANTA MOTEL v. UNITED STATES.

of the Act in this regard are in any way "akin to African slavery." *Butler v. Perry*, 240 U. S. 328, 332 (1916).

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress. It is subject only to one *caveat*—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

Affirmed.

APPENDIX.

Title II—INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION

SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

22 ATLANTA MOTEL v. UNITED STATES.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or

ATLANTA MOTEL v. UNITED STATES. 23

patrons of an establishment within the scope of subsection (b).

SEC. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

SEC. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

SEC. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

(b) In any action commenced pursuant to this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's

24 ATLANTA MOTEL v. UNITED STATES.

fee as part of the costs, and the United States shall be liable for costs the same as a private person.

(c) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

(d) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a): *Provided*, That the court may refer the matter to the Community Relations Service established by title X of this Act for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days: *Provided further*, That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

SEC. 205. The Service is authorized to make a full investigation of any complaint referred to it by the court under section 204 (d) and may hold such hearings with respect thereto as may be necessary. The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved

in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

SEC. 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so

designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

Sec. 207. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(b) The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

SUPREME COURT OF THE UNITED STATES

Nos. 515 AND 543.—OCTOBER TERM, 1964.

| | | |
|---|---|--|
| Heart of Atlanta Motel, Inc., Appellant, 515 v. United States et al. | } | On Appeal From the United States District Court for the Northern District of Georgia. |
|---|---|--|

| | | |
|---|---|--|
| Nicholas deB. Katzenbach, Acting Attorney General, et al., Appellants, 543 v. Ollie McClung, Sr., and Ollie McClung, Jr. | } | On Appeal From the United States District Court for the Northern District of Alabama. |
|---|---|--|

[December 14, 1964.]

MR. JUSTICE BLACK, concurring.

In the first of these two cases the Heart of Atlanta Motel, a large motel in downtown Atlanta, Georgia, appeals from an order of a three-judge United States District Court for the Northern District of Georgia enjoining it from continuing to violate Title II of the Civil Rights Act of 1964¹ by refusing to accept Negroes as lodgers solely because of their race. In the second case the Acting Attorney General of the United States and a United States Attorney appeal from a judgment of a three-judge United States District Court for the Northern District of Alabama holding that Title II cannot constitutionally be applied to Ollie's Barbecue, a restaurant in Birmingham, Alabama, which serves few if any interstate travelers but which buys a substantial quantity of food which has moved in interstate commerce. It is undisputed that

¹ 78 Stat. 241, — U. S. C. § — (Supp. — 1964); Title II is found at 78 Stat. — — —, — U. S. C. §§ — — — (Supp. — 1964).

2 ATLANTA MOTEL v. UNITED STATES.

both establishments had and intended to continue a policy against serving Negroes. Both claimed that Congress had exceeded its constitutional powers in attempting to compel them to use their privately owned businesses to serve customers whom they did not want to serve.

The most immediately relevant parts of Title II of the Act, which, if valid, subject this motel and restaurant to its requirements are set out below.* The language of

* Section 201 of the Act, 78 Stat. 241, 243, — U. S. C. § — (Supp. — 1964) provides in part:

"(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

"(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

"(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States"

that Title shows that Congress in passing it intended to exercise—at least in part—power granted in the Constitution by Art. I, § 8, "To regulate Commerce . . . among the several States" Thus § 201 (b) of Title II by its terms is limited in application to a motel or restaurant of which the "operations affect [interstate] commerce, or if discrimination or segregation by it is supported by State action."³ The "State action" provision need not concern us here since there is no contention that Georgia or Alabama has at this time given any support whatever to these 'establishments' racially discriminatory practices. The basic constitutional question decided by the courts below and which this Court must now decide is whether Congress exceeded its powers to regulate interstate commerce and pass all laws necessary and proper to such regulation in subjecting either this motel or this restaurant to Title II's commands that applicants for food and lodging be served without regard to their color. And if the regulation is otherwise within the congressional commerce power, the motel and the restaurant proprietors further contend that it would be a denial of due process under the Fifth Amendment to compel them to serve Negroes against their will.⁴ I agree that all these constitutional contentions must be rejected.

³ This last definitional clause of § 201 (b) together with § 202 show a congressional purpose also to rely in part on § 1 of the Fourteenth Amendment, which forbids any State to deny due process or equal protection of the laws. There is no contention in these cases that Congress relied on the fifth section of the Fourteenth Amendment granting it "power to enforce, by appropriate legislation, the provisions of" the Amendment.

⁴ The motel also argues that the law violates the Thirteenth Amendment's prohibition of slavery or involuntary servitude and takes private property for public use without just compensation, in violation of the Fifth Amendment.

I.

It requires no novel or strained interpretation of the Commerce Clause to sustain Title II as applied in either of these cases. At least since *Gibbons v. Ogden*, 9 Wheat. 1, decided in 1824 in an opinion by Chief Justice John Marshall, it has been uniformly accepted that the power of Congress to regulate commerce among the States is plenary, "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." 9 Wheat., at 196. Nor is "Commerce" as used in the Commerce Clause to be limited to a narrow, technical concept. It includes not only, as Congress has enumerated in the Act, "travel, trade, traffic, commerce, transportation, or communication," but also all other unitary transactions and activities that take place in more States than one. That some parts or segments of such unitary transactions may take place only in one State cannot, of course, take from Congress its plenary power to regulate them in the national interest.³ The facilities and instrumentalities used to carry on this commerce, such as railroads, truck lines, ships, rivers, and even highways are also subject to congressional regulation, so far as is necessary to keep interstate traffic upon fair and equal terms. *The Daniel Ball*, 10 Wall. 557.

Furthermore, it has long been held that the Necessary and Proper Clause, Art. 1, § 8, cl. 18, adds to the commerce power of Congress the power to regulate local instrumentalities operating within a single state if their activities burden the flow of commerce among the States. Thus in the *Shreveport Case*, *Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342, 353-354, this Court recog-

³ Compare *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, 546-547; *Board of Trade v. Olsen*, 262 U. S. 1, 33-36; *Swift & Co. v. United States*, 196 U. S. 375, 398-399.

nized that Congress could not fully carry out its responsibility to protect interstate commerce were its constitutional power to regulate that commerce to be strictly limited to prescribing the rules for controlling the things actually moving in such commerce or the contracts, transactions, and other activities, immediately concerning them. Regulation of purely intrastate railroad rates is primarily a local problem for state rather than national control. But the *Shreveport Case* sustained the power of Congress under the Commerce Clause and the Necessary and Proper Clause to control purely intrastate rates, even though reasonable, where the effect of such rates was found to impose a discrimination injurious to interstate commerce. This holding that Congress had power under these clauses, not merely to enact laws governing interstate activities and transactions, but also to regulate even purely local activities and transactions where necessary to foster and protect interstate commerce, was amply supported by Mr. Justice (later Mr. Chief Justice) Hughes' reliance upon many prior holdings of this Court extending back to *Gibbons v. Ogden, supra*.^{*} And since the *Shreveport Case* this Court has steadfastly followed, and indeed has emphasized time and time again, that Congress has ample power to protect interstate commerce from activities adversely and injuriously affecting it, which but for this adverse effect on interstate commerce would be beyond the power of Congress to regulate.[†]

^{*} "The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government." *Gibbons v. Ogden, supra*, 9 Wheat., at 195. (Emphasis supplied.)

[†] See, e. g., *Labor Board v. Reliance Fuel Oil Corp.*, 371 U. S. 224; *Loran Journal Co. v. United States*, 342 U. S. 143; *United States v.*

Congress in § 201 declared that the racially discriminatory "operations" of a motel of more than five rooms for rent or hire do adversely affect interstate commerce if it "provides lodging to transient guests . . ." and that restaurant "operations" affect such commerce if (1) "it serves or offers to serve interstate travelers" or (2) "a substantial portion of the food which it serves . . . has moved in [interstate] commerce." Congress thus described the nature and extent of operations which it wished to regulate, excluding some establishments from the Act either for reasons of policy or because it believed its powers to regulate and protect interstate commerce did not extend so far. There can be no doubt that the operations of both the motel and the restaurant here fall squarely within the measure Congress chose to adopt in the Act and deemed adequate to show a constitutionally prohibitable adverse effect on commerce. The choice of policy is of course within the exclusive power of Congress; but whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court. I agree that as applied to this motel and this restaurant the Act is a valid exercise of congressional power, in the case of the motel because the record amply demonstrates that its practice of discrimination tended directly to interfere with interstate travel, and in the case of the restaurant because Congress had

Women's Sportswear Manufacturers Assn., 336 U. S. 460; *United States v. Sullivan*, 332 U. S. 689; *Wickard v. Filburn*, 317 U. S. 111; *United States v. Wrightwood Dairy Co.*, 315 U. S. 110; *United States v. Darby*, 312 U. S. 100; *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U. S. 334. See also *Southern R. Co. v. United States*, 222 U. S. 20.

ample basis for concluding that a widespread practice of racial discrimination by restaurants buying as substantial a quantity of goods shipped from other States as this restaurant buys could distort or impede interstate trade.

The Heart of Atlanta Motel is a large 216-room establishment strategically located in relation to Atlanta and interstate travelers. It advertises extensively by signs along interstate highways and in various advertising media. As a result of these circumstances approximately 75% of the motel guests are transient interstate travelers. It is thus an important facility for use by interstate travelers who travel on highways, since travelers in their own cars must find lodging places to make their journeys comfortably and safely.

The restaurant is located in a residential and industrial section of Birmingham, 11 blocks from the nearest interstate highway. Almost all, if not all, its patrons are local people rather than transients. It has seats for about 200 customers and annual gross sales of about \$350,000. Most of its sales are of barbecued meat sandwiches and pies. Consequently, the main commodity it purchases is meat, of which during the 12 months before the District Court hearing it bought \$69,683 worth (representing 46% of its total expenditures for supplies), which had been shipped into Alabama from outside the State. Plainly, 46% of the goods it sells is a "substantial" portion and amount. Congress concluded that restaurants which purchase a substantial quantity of goods from other States might well burden and disrupt the flow of interstate commerce if allowed to practice racial discrimination, because of the stifling and distorting effect that such discrimination on a wide scale might well have on the sale of goods shipped across state lines. Certainly this belief would not be irrational even had there not been

8 ATLANTA MOTEL v. UNITED STATES.

a large body of evidence before the Congress to show the probability of this adverse effect.*

The foregoing facts are more than enough, in my judgment, to show that Congress acting within its discretion and judgment has power under the Commerce Clause and the Necessary and Proper Clause to bar racial discrimination in the Heart of Atlanta Motel and Ollie's Barbecue. I recognize that every remote, possible, speculative effect on commerce should not be accepted as an adequate constitutional ground to uproot and throw into the discard all our traditional distinctions between what is purely local, and therefore controlled by state laws, and what affects the national interest and is therefore subject to control by federal laws. I recognize too that some isolated and remote lunch room which sells only to local people and buys almost all its supplies in the locality may possibly be beyond the reach of the power of Congress to regulate commerce, just as such an establishment is not covered by the present Act. But in deciding the constitutional power of Congress in cases like the two before us we do not consider the effect on interstate commerce of only one isolated, individual, local event, without regard to the fact that this single local event when added to many others of a similar nature may impose a burden on interstate commerce by reducing its volume or distorting its flow. *Labor Board v. Reliance Fuel Oil Corp.*, 371 U. S. 224; *Wickard v. Filburn*, *supra*, 317 U. S., at 127-128; *United States v. Darby*, *supra*, 312 U. S., at 123; *Labor Board v. Fainblatt*, 306 U. S. 601, 608-609; cf. *Hotel Employees Local No. 255 v. Leedom*, 358 U. S. 99. There are

* See, e. g., Hearings Before the Committee on Commerce on S. 1732, U. S. Senate, 88th Cong., 1st Sess., Part 1, Ser. 26, pp. 18-19 (Attorney General Kennedy), 623-630 (Secretary of Labor Wirtz); Part 2, Ser. 26, pp. 695-700 (Under Secretary of Commerce Roosevelt).

approximately 20,000,000 Negroes in our country.* Many of them are able to, and do, travel among the States in automobiles. Certainly it would seriously discourage such travel by them if, as evidence before the Congress indicated has been true in the past,¹⁰ they should in the future continue to be unable to find a decent place along their way in which to lodge or eat. Cf. *Boynton v. Virginia*, 364 U. S. 454. And the flow of interstate commerce may be impeded or distorted substantially if local sellers of interstate food are permitted to exclude all Negro consumers. Measuring, as this Court has so often held is required, by the aggregate effect of a great number of such acts of discrimination, I am of the opinion that Congress has constitutional power under the Commerce and Necessary and Proper Clauses to protect interstate commerce from the injuries bound to befall it from these discriminatory practices.

Long ago this Court, again speaking through Mr. Chief Justice Marshall, said:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."
M'Culloch v. Maryland, 4 Wheat. 316, 412.

By this standard Congress acted within its power here. In view of the Commerce Clause it is not possible to deny that the aim of protecting interstate commerce from undue burdens is a legitimate end. In view of the Thirteenth, Fourteenth and Fifteenth Amendments, it is not possible to deny that the aim of protecting Negroes from

* Bureau of the Census, 1964 Statistical Abstract of the United States; 25 (18,872,000 Negroes by 1960 census).

¹⁰ See, e. g., Sen. Rep. No. 872, 88th Cong., 2d Sess., 15-18.

10 ATLANTA MOTEL v. UNITED STATES.

discrimination is also a legitimate end.¹¹ The means adopted to achieve these ends are also appropriate, plainly adopted to achieve them and not prohibited by the Constitution but consistent with both its letter and spirit.

II.

The restaurant and motel proprietors argue also, however, that Congress violated the Due Process Clause of the Fifth Amendment, by requiring that they serve Negroes if they serve others. This argument comes down to this: that the broad power of Congress to enact laws deemed necessary and proper to regulate and protect interstate commerce is practically nullified by the negative constitutional commands that no person shall be deprived of "life, liberty, or property, without due process of law" and that private property shall not be "taken" for public use without just compensation. In the past this Court has consistently held that regulation of the use of property by the Federal Government or by the States does not violate either the Fifth or the Fourteenth Amendments. See, *e. g.*, *Ferguson v. Skrupa*, 372 U. S. 726;

¹¹ We have specifically upheld the power of Congress to use the commerce power to end racial discrimination. *Boynton v. Virginia*, 364 U. S. 454; *Henderson v. United States*, 339 U. S. 816; *Mitchell v. United States*, 313 U. S. 80; cf. *Bailey v. Patterson*, 369 U. S. 31; *Morgan v. Virginia*, 328 U. S. 373. Compare cases in which the commerce power has been used to advance other ends not entirely commercial: *e. g.*, *United States v. Darby*, 312 U. S. 100 (Fair Labor Standards Act); *United States v. Miller*, 307 U. S. 174 (National Firearms Act); *Gooch v. United States*, 297 U. S. 124 (Federal Kidnaping Act); *Brooks v. United States*, 267 U. S. 432 (National Motor Vehicle Theft Act); *United States v. Simpson*, 252 U. S. 465 (Act forbidding shipment of liquor into a "dry" State); *Caminetti v. United States*, 242 U. S. 470 (White-Slave Traffic [Mann] Act); *Hoke v. United States*, 227 U. S. 308 (White-Slave Traffic [Mann] Act); *Hipolite Egg Co. v. United States*, 220 U. S. 45 (Pure Food and Drug Act); *Lottery Case*, 188 U. S. 321 (Act forbidding interstate shipment of lottery tickets).

District of Columbia v. John R. Thompson Co., 346 U. S. 100; *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365; *Nebbia v. New York*, 291 U. S. 502. A regulation such as that found in Title II does not even come close to being a "taking" in the constitutional sense. Cf. *United States v. Central Eureka Mining Co.*, 357 U. S. 155. And a more or less vague clause like the requirement for due process, originally meaning "according to the law of the land" would be a highly inappropriate provision on which to rely to invalidate a "law of the land" enacted by Congress under a clearly granted power like that to regulate interstate commerce. Moreover, it would be highly ironical to use the guarantee of due process—a guarantee which plays so important a part in the Fourteenth Amendment, an amendment adopted with the predominant aim of protecting Negroes from discrimination—in order to strip Congress of power to protect Negroes from discrimination.¹²

III.

For the foregoing reasons I concur in holding that the anti-racial-discrimination provisions of Title II of the Civil Rights Act of 1964 are valid as applied to this motel and restaurant. I should add that nothing in the *Civil Rights Cases*, 109 U. S. 3, which invalidated the Civil Rights Act of 1875,¹³ gives the slightest support to the argument that Congress is without power under the Commerce Clause to enact the present legislation, since in the *Civil Rights Cases* this Court expressly left undecided the validity of such antidiscrimination legislation if rested on the Commerce Clause. See 109 U. S., at 18-19; see also *Butts v. Merchants & Miners Transp. Co.*, 230 U. S. 126, 132. Nor does any view expressed in my dissenting

¹² The motel's argument that Title II violates the Thirteenth Amendment is so insubstantial that it requires no further discussion.

¹³ 18 Stat. 335.

12 ATLANTA MOTEL v. UNITED STATES.

opinion in *Bell v. Maryland*, 378 U. S. 226, 318, in which MR. JUSTICE HARLAN and MR. JUSTICE WHITE joined, affect this conclusion in the slightest, for that opinion stated only that the Fourteenth Amendment in and of itself, without implementation by a law passed by Congress, does not bar racial discrimination in privately owned places of business in the absence of state action. The opinion did not discuss the power of Congress under the Commerce and Necessary and Proper Clauses or under section 5 of the Fourteenth Amendment to pass a law forbidding such discrimination. See 378 U. S., at 318, 326, 342-343 and n. 44. Because the Civil Rights Act of 1964 as applied here is wholly valid under the Commerce Clause and the Necessary and Proper Clause, there is no need to consider whether this Act is also constitutionally supportable under section 5 of the Fourteenth Amendment which grants Congress "power to enforce, by appropriate legislation, the provisions of this article."

SUPREME COURT OF THE UNITED STATES

Nos. 515 AND 543.—OCTOBER TERM, 1964.

Heart of Atlanta Motel, Inc.,
Appellant,
515 v.
United States et al. } On Appeal From the
United States District
Court for the Northern
District of Georgia.

Nicholas deB. Katzenbach,
Acting Attorney General,
et al., Appellants,
543 v.
Ollie McClung, Sr., and Ollie
McClung, Jr. } On Appeal From the
United States District
Court for the Northern
District of Alabama.

[December 14, 1964.]

MR. JUSTICE DOUGLAS, concurring.

I.

Though I join the Court's opinion, I am somewhat reluctant here, as I was in *Edwards v. California*, 314 U. S. 160, 177, to rest solely on the Commerce Clause. My reluctance is not due to any conviction that Congress lacks power to regulate commerce in the interests of human rights. It is rather my belief that the right of people to be free of state action that discriminates against them because of race, like the "right to persons to move freely from State to State" (*Edwards v. California*, *supra*, at 177), "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines." *Ibid.* Moreover, when we come to the problem of abatement in *Hamm v. City of Rock Hill*, *post*, —, decided this day, the result reached by the Court is for me much more obvious as a protective measure under the Fourteenth Amendment than under the Commerce Clause. For the former deals with the constitutional status of the indi-

2 ATLANTA MOTEL v. UNITED STATES.

vidual not with the impact on commerce of local activities or vice versa.

Hence I would prefer to rest on the assertion of legislative power contained in § 5 of the Fourteenth Amendment which states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"—a power which the Court concedes was exercised at least in part in this Act.

A decision based on the Fourteenth Amendment would have a more settling effect, making unnecessary litigation over whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler. Under my construction, the Act would apply to all customers in all the enumerated places of public accommodation. And that construction would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American history.

My opinion last Term in *Bell v. Maryland*, 378 U. S. 226, 242, makes clear my position that the right to be free of discriminatory treatment (based on race) in places of public accommodation—whether intrastate or interstate—is a right guaranteed against state action by the Fourteenth Amendment and that state enforcement of the kind of trespass laws which Maryland had in that case was state action within the meaning of the Amendment.

II.

I think the Court is correct in concluding that the Act is not founded on the Commerce Clause to the exclusion of the Enforcement Clause of the Fourteenth Amendment.

In determining the reach of an exertion of legislative power, it is customary to read various granted powers together. See *Veazie Bank v. Fenno*, 75 U. S. 533, 548-549; *Edye v. Robertson*, 112 U. S. 580, 595-596; *United*

ATLANTA MOTEL v. UNITED STATES. 3

States v. Gettysburg Electric R. Co., 160 U. S. 668, 683.
As stated in *McCulloch v. Maryland*, 4 Wheat. 316, 421:

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

The "means" used in the present Act are in my view "appropriate" and "plainly adapted" to the end of enforcing Fourteenth Amendment rights¹ as well as protecting interstate commerce.

Section 201 (a) declares in Fourteenth Amendment language the right of equal access:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

The rights protected are clearly within the purview of our decisions under the Equal Protection Clause of the Fourteenth Amendment.²

¹ For a synopsis of the legislative history see the Appendix to this opinion.

² See *Peterson v. City of Greenville*, 373 U. S. 244 (discrimination in restaurant); *Lombard v. Louisiana*, 373 U. S. 267 (discrimination

4 ATLANTA MOTEL v. UNITED STATES.

"State action"—the key to Fourteenth Amendment guarantees—is defined by § 201 (d) as follows:

Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof, [*Italics added.*]

That definition is within our decision of *Shelley v. Kraemer*, 334 U. S. 1, for the "discrimination" in the present cases is "enforced by officials of the State," i. e., by the state judiciary under the trespass laws.³ As we wrote in *Shelley v. Kraemer*, *supra*, 19:

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action.

in restaurant); *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (discrimination in restaurant); *Watson v. City of Memphis*, 373 U. S. 526 (discrimination in city park); *Brown v. Board of Education*, 347 U. S. 483 (discrimination in public school system); *Nixon v. Herndon*, 273 U. S. 536 (discrimination in voting).

³ The Georgia trespass law is found in Ga. Code Ann., § 26-3005 (1963 Supp.), and that of Alabama in Ala. Code, 1959, Tit. 14, § 426.

leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

Section 202 declares the right of all persons to be free from certain kinds of state action at *any* public establishment—not just at the previously enumerated places of public accommodation:

All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Thus the essence of many of the guarantees embodied in the Act are those contained in the Fourteenth Amendment.

The Commerce Clause, to be sure, enters into some of the definitions of "place of public accommodation" in §§ 201 (b) and (c). Thus a "restaurant" is included, § 201 (b)(2), "if it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce." § 201 (c)(2). But any "motel" is included "which provides lodging to tran-

6 ATLANTA MOTEL v. UNITED STATES.

sient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence." §§ 201 (b)(1) and (c)(1). Providing lodging "to transient guests" is not strictly Commerce Clause talk; for the phrase aptly describes any guest—local or interstate.

Thus some of the definitions of "place of public accommodation" in § 201 (b) are in Commerce Clause language and some are not. Indeed § 201 (b) is explicitly bifurcated. An establishment "which serves the public is a place of public accommodation," says § 201 (b), under either of two conditions: *first*, "if its operations affect commerce," or *second*, "if discrimination or segregation by it is supported by State action."

The House Report emphasizes these dual bases on which the Act rests. (H. R. Rep. No. 914, 88th Cong., 1st Sess., p. 20)—a situation which a minority recognized was being attempted and which it opposed. *Id.*, pp. 98-101.

The Senate Committee laid emphasis on the Commerce Clause. S. Rep. No. 872, 88th Cong., 2d Sess., pp. 12-13. The use of the Commerce Clause, to surmount what was thought to be the obstacle of the *Civil Rights Cases*, 109 U. S. 3, is mentioned. *Ibid.* And the economic aspects of the problems of discrimination are heavily accented. *Id.*, pp. 17 *et seq.* But it is clear that the objectives of the Fourteenth Amendment were by no means ignored. As stated in the Senate Report:

Does the owner of private property devoted to use as a public establishment enjoy a property right to refuse to deal with any member of the public because of that member's race, religion, or national origin? As noted previously, the English common law answered this question in the negative. It reasoned that one who employed his private property

for purposes of commercial gain by offering goods or services to the public must stick to his bargain. It is to be remembered that the right of the private property owner to serve or sell to whom he pleased was never claimed when laws were enacted prohibiting the private property owner from dealing with persons of a particular race. Nor were such laws ever struck down as an infringement upon this supposed right of the property owner.

But there are stronger and more persuasive reasons for not allowing concepts of private property to defeat public accommodations legislation. The institution of private property exists for the purpose of enhancing the individual freedom and liberty of human beings. This institution assures that the individual need not be at the mercy of others, including government, in order to earn a livelihood and prosper from his individual efforts. Private property provides the individual with something of value that will serve him well in obtaining what he desires or requires in his daily life.

Is this time honored means to freedom and liberty now to be twisted so as to defeat individual freedom and liberty? Certainly denial of a right to discriminate or segregate by race or religion would not weaken the attributes of private property that make it an effective means of obtaining individual freedom. In fact, in order to assure that the institution of private property serves the end of individual freedom and liberty it has been restricted in many instances. The most striking example of this is the abolition of slavery. Slaves were treated as items of private property, yet surely no man dedicated to the cause of individual freedom could contend that individual freedom and liberty suffered by emancipation of the slaves.

8 ATLANTA MOTEL v. UNITED STATES.

There is not any question that ordinary zoning laws place far greater restrictions upon the rights of private property owners than would public accommodations legislation. Zoning laws tell the owner of private property to what type of business his property may be devoted, what structures he may erect upon that property, and even whether he may devote his private property to any business purpose whatsoever. Such laws and regulations restricting private property are necessary so that human beings may develop their communities in a reasonable and peaceful manner. Surely the presence of such restrictions does not detract from the role of private property in securing individual liberty and freedom.

Nor can it be reasonably argued that racial or religious discrimination is a vital factor in the ability of private property to constitute an effective vehicle for assuring personal freedom. The pledge of this Nation is to secure freedom for every individual; that pledge will be furthered by elimination of such practices. [*Id.*, pp. 22-23.]

Thus while I agree with the Court that Congress in fashioning the present Act used the Commerce Clause to regulate racial segregation, it also used (and properly so) some of its power under § 5 of the Fourteenth Amendment.

I repeat what I said earlier, that our decision should be based on the Fourteenth Amendment, thereby putting an end to all obstructionist strategies and allowing every person—whatever his race, creed, or color—to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate.

APPENDIX.

(1) *The Administration Bill* (as introduced in the House by Congressman Celler, it was H. R. 7152).

Unlike the Act as it finally became law, this bill (a) contained findings (pp. 10-13) which described discrimination in places of public accommodation and in findings (h) and (i) connected this discrimination to state action and invoked Fourteenth Amendment powers to deal with the problem; and (b) the bill, in setting forth the public establishments which were covered, used only commerce-type language and did not contain anything like the present § 201 (d) and its link to § 201 (b)—the "or" clause in § 201 (b). Nor did the bill contain the present § 202.

In the hearings before the House Judiciary Subcommittee the Attorney General stated clearly and repeatedly that while the bill relied "primarily" on the Commerce Clause, it was also intended to rest on the Fourteenth Amendment. See Hearings before Subcommittee No. 5, House Judiciary Committee, 88th Cong., 1st Sess., 1375-1376, 1388, 1396, 1410, 1417-1419.

(2) *The Subcommittee Bill* (as reported to the full House Judiciary Committee).

The Attorney General testified against portions of this bill. He reiterated that the administration bill rested on the Fourteenth Amendment as well as on the Commerce Clause: see Hearings, House Judiciary Committee on H. R. 7152, as amended, Subcommittee No. 5, 88th Cong., 1st Sess., 2693, 2700, 2764. But this bill added for the first time a provision similar to the present § 201 (d)—only much broader. See *id.*, at 2656, first full paragraph. (Apparently this addition was in response to the urgings of those who wanted to broaden the bill and who failed to comprehend that the administration

10 ATLANTA MOTEL v. UNITED STATES:

bill already rested, despite its commerce language, on the Fourteenth Amendment.) The Attorney General feared that the new provision went too far. Further, the new provision, unlike the present § 201 (d) but like the present § 202, did not limit coverage to those establishments specifically defined as places of public accommodation; rather it referred to all businesses operating under state "authorization, permission, or license." See *id.*, at 2656 top. The Attorney General objected to this: Congress ought not to invoke the Fourteenth Amendment generally but rather ought to specify the establishments that would be covered. See *id.*, at 2656, 2675-2676, 2726. This the administration bill had done by covering only those establishments which had certain commercial characteristics.

Subsequently the Attorney General indicated that he would accept a portion of the subcommittee additions that ultimately became §§ 201 (d) and 202; but he made it clear that he did not understand that these additions removed the Fourteenth Amendment foundation which the administration had placed under its bill. He did not understand that these additions confined the Fourteenth Amendment foundation of the bill to the additions alone; the commerce language sections were still supported in the alternative by the Fourteenth Amendment. See especially *id.*, at 2764; compare p. 2727 with p. 2698. The Subcommittee said that it made these additions in order to insure that the Fourteenth Amendment was relied on. See *id.*, at 2763; also Subcommittee Hearings, *supra*, 1413-1421. And the Attorney General repeated at p. 2764 that he would agree to whatever language was necessary to make it clear that the bill relied on the Fourteenth Amendment as well as the Commerce Clause.

Therefore it seems clear that a dual motive was behind the addition of what ultimately became §§ 201 (d) and 202: (1) to expand the coverage of the Act; (2) to make it

clear that Congress was invoking its powers under the Fourteenth Amendment.

(3) *The Committee Bill* (as reported to the House).

This bill contains the present §§ 201 (d) and 202, except that "state action" is given an even broader definition in § 201 (d) as then written than it has in the present § 201 (d).

The House Report has the following statement: "Section 201 (d) delineates the circumstances under which discrimination or segregation by an establishment is supported by State action within the meaning of title II." H. R. Rep. No. 914, 88th Cong., 1st Sess., 21. On p. 117 of the Report Representative Cramer says: "The 14th amendment approach to public accommodations [in the committee bill as contrasted with the administration bill] is not limited to the narrower definition of 'establishment' under the interstate commerce approach and covers broad State 'custom or usage' or where discrimination is 'fostered or encouraged' by State action (sec. 201 (d))." By implication the committee has merely broadened the coverage of the administration's bill by adding the explicit state action language; it has not thereby removed the Fourteenth Amendment foundation from the commerce language coverage.

Congressman Celler introduced into the Congressional Record a series of memoranda on the constitutionality of the various titles of the bill; at pp. 1462-1463* the Fourteenth Amendment is discussed; at p. 1463 it is suggested that the Thirteenth Amendment is to be regarded as "additional authority" for the legislation.

At p. 1837 Congressman Willis introduces an amendment to strike out "transient guests" and to replace these words with "interstate travelers." As reported, says Con-

*All citations are to the daily Records for January 31 to February 5, 1964, not to the bound volumes, as they were unavailable when this Appendix was prepared.

12 ATLANTA MOTEL v. UNITED STATES.

gressman Willis, the bill boldly undertakes to regulate intrastate commerce, at least to this extent. *Ibid.* The purpose of the amendment is simply to relate "this bill to the powers of Congress." *Ibid.* Congressman Celler, the floor manager of the bill, will not accept the amendment, which introduces an element of uncertainty into the scope of the bill's coverage. At p. 1844 Congressman Lindsay makes remarks indicating that it is his understanding that the commerce language portions of § 201 rest only on the Commerce Clause, while the Fourteenth Amendment is invoked to support only § 201 (d).

But at p. 1846 Congressman MacGregor, a member of the Judiciary Subcommittee, states, in response to Congressman Willis's challenge to the constitutionality of the "transient guests" coverage, that: "When the gentleman from Louisiana seeks in subparagraph (1) on page 43 [§ 201 (b)(1)] to tightly circumscribe the number of inns, hotels and motels to be covered under this legislation he does violence to the 1883 Supreme Court decision where it defines the authority of the Congress under the 14th amendment. . . . Mr. Chairman, in light of the 1883 Supreme Court decision cited by the gentleman from Louisiana, and in light of a score of subsequent decisions, it is precisely the legislative authority granted in the 14th amendment that we seek here to exercise."

At pp. 1879-1884 there is the discussion surrounding the passage of the Goodell amendment striking the word "encouraged" from § 201 (d)(2) of the bill as reported. Likewise in these pages there is the discussion concerning the Willis amendment to the Goodell amendment: this amendment eliminated the word "fostered." After the adoption of these amendments the custom or usage had to be "required or enforced" by the State—not merely "fostered or encouraged" in order to constitute "state action" within the meaning of the Act.

At p. 1880 Congressman Smith of Virginia offered an amendment as a substitute to the Goodell amendment that would have eliminated the "custom or usage" language altogether. Congressman Celler said in defense of the bill as reported: "[C]ustom or usage is not constituted merely by a practice in a neighborhood or by popular attitude in a particular community. It consists of a practice which, though not embodied in law, receives notice and sanction to the extent that it is enforced by the officialdom of the State or locality" (p. 1881). The Smith Amendment was rejected by the House (p. 1883).

It would seem that the action on this Smith substitute and the statement by Congressman Celler mean that a state's enforcement of the custom of segregation in places of public accommodation by the use of its trespass laws is a violation of § 201 (d)(2).

(4) *The House Bill.*

The House bill was placed directly on the Senate calendar and did not go to committee. The Dirksen-Mansfield substitute adopted by the Senate made only one change in §§ 201 and 202: it changed "a" to "the" in § 201 (d)(3). Senator Dirksen nowhere made any explicit references to the constitutional bases of Title II. Thus it is fair to assume that the Senate's understanding on this question was no different from the House's view. The Senate substitute was adopted without change by the House on July 2, 1964, and signed by the President on the same day.

SUPREME COURT OF THE UNITED STATES

Nos. 515 AND 543.—OCTOBER TERM, 1964.

Heart of Atlanta Motel, Inc.,
Appellant.
515 v.
United States et al. } On Appeal From the
United States District
Court for the Northern
District of Georgia.

Nicholas deB. Katzenbach,
Acting Attorney General,
et al., Appellants.
543 v.
Ollie McClung, Sr., and Ollie
McClung, Jr. } On Appeal From the
United States District
Court for the Northern
District of Alabama.

[December 14, 1964.]

MR. JUSTICE GOLDBERG, concurring.

I join in the opinions and judgments of the Court, since I agree "that the action of the Congress in the adoption of the Act as applied here . . . is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years," *Heart of Atlanta Motel, Inc. v. United States*, at 20.

The primary purpose of the Civil Rights Act of 1964, however, as the Court recognizes, and as I would underscore, is the vindication of human dignity and not mere economics. The Senate Commerce Committee made this quite clear:

The primary purpose of . . . [the Civil Rights Act], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when

2 ATLANTA MOTEL v. UNITED STATES.

he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues. [S. Rep. No. 872, 88th Cong., 2d Sess., 16.]

Moreover, that this is the primary purpose of the Act is emphasized by the fact that while § 201 (c) speaks only in terms of establishments which "affect commerce," it is clear that Congress based this section not only on its power under the Commerce Clause but also on § 5 of the Fourteenth Amendment.* The cases cited in the Court's

*Hearings in Congress as well as statements by administration spokesmen show that the original bill, presented by the administration, was so based even though it contained no clause which resembled § 201 (d)—the so-called "state action" provision—or which even mentioned "state action." See, *e. g.*, Hearings before Senate Committees on Commerce on S. 1732, 88th Cong., 1st Sess., 23, 27-28, 57, 74, 230, 247-248, 250, 252-253, 256, 259; Hearings before Senate Judiciary Committee on S. 1731, 88th Cong., 1st Sess., 151, 152, 186; Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H. R. 7152, 88th Cong., 1st Sess., 1396, 1410, 2693, 2699-2700; S. Rep. No. 872, 88th Cong., 1st Sess., 2. The later additions of "state action" language to § 201 (a) and § 201 (d) did not remove the dual Commerce Clause-Fourteenth Amendment support from the rest of the bill, for those who added this clause did not intend thereby to bifurcate its constitutional basis. This language and § 201 (d) were added, first, in order to make certain that the Act would cover all or almost all of the situations as to which this Court might hold that § 1 of the Fourteenth Amendment applied. Senator Hart stated that not to do so would "embarrass Congress because . . . the reach of the administration bill would be less inclusive than that Court-established right." Hearings before Senate Commerce Committee, *supra*, at 256. See also *id.*, at 259-262. Second, the sponsors of § 201 (d) were trying to make even clearer

opinions are conclusive that Congress could exercise its powers under the Commerce Clause to accomplish this purpose. As §§ 201 (b) and (c) are undoubtedly a valid exercise of the Commerce Clause power for the reasons stated in the opinion of the Court, the Court considers that it is unnecessary to consider whether it is additionally supportable by Congress' exertion of its power under § 5 of the Fourteenth Amendment.

In my concurring opinion in *Bell v. Maryland*, 378 U. S. 226, 317, however, I expressed my conviction that § 1 of the Fourteenth Amendment guarantees to all Americans the constitutional right "to be treated as equal members of the community with respect to public accommodations," and that "Congress [has] authority under § 5 of the Fourteenth Amendment, or under the Commerce Clause, Art. I, § 8, to implement the rights protected by § 1 of the Fourteenth Amendment. In the give-and-take of the legislative process, Congress can fashion a law drawing the guidelines necessary and appropriate to facilitate practical administration and to distinguish between genuinely public and private accommodations." The challenged Act is just such a law and, in my view, Congress clearly had authority both under § 5 of the Fourteenth Amendment and the Commerce Clause to enact the Civil Rights Act of 1964.

the Fourteenth Amendment basis of Title II. See, e. g., Hearings before Subcommittee No. 5 of the House Committee, *supra*, at 1413-1418; Hearings before the Senate Commerce Committee, *supra*, at 259-262. There is no indication that they thought the inclusion of § 201 (d) would remove the Fourteenth Amendment foundation of the rest of the title. Third, the history of the bill after provisions similar to § 201 (d) were added contains references to the dual foundation of all Title II provisions before us. See *id.*, at 1396, 1410, 2693, 2699-2700; Cong. Rec., Feb. 4, 1964, 1846-1848.